Master Advocate Institute Series:
Ambushes & Minefields in the Courtroom

July 19, 2002

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STEPHEN WIZNER, WILLIAM O. DOUGLAS CLINICAL PROFESSOR OF LAW, YALE LAW SCHOOL

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Douglas S. Lavine

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Douglas S. Lavine is a Superior Court Judge in Connecticut, presiding over civil and criminal trials. Prior to becoming a judge, he was an Assistant United States Attorney for the District of Connecticut and was in private practice. He also taught advocacy on the adjunct faculty at the University of Connecticut School of Law. *Cardinal Rules of Advocacy* is his first book.

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About the author:

Ruggero J. Aldisert, Senior United States Circuit Judge, is the former Chief Judge of the United States Court of Appeals for the Third Circuit. He is a prominent teacher and author and has published over 30 articles in the fields of jurisprudence, civil procedure, federal jurisdiction, among others. He is the author of numerous books, including *Winning on Appeal: Better Briefs and Oral Argument* (NITA, 1996).

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Steven Lubet is Professor of Law at Northwestern University in Chicago. In addition to over 30 books and articles on legal ethics and litigation, he has published widely in the areas of international criminal law and dispute resolution. His most recent book is *Expert Testimony: A Guide for Expert Witnesses and the Lawyers Who Examine Them* (NITA, 1998).

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About the author:

David Ball, Ph.D., a nationally known jury consultant and trial skills trainer, is a leading authority on adapting audience persuasion techniques from theater and film to in-court use. Trained in communications, theater, and film, his credits as a director, producer, and playwright include the Guthrie Theater, Broadway and off-Broadway, Carnegie Mellon University, and Duke University where he chaired the drama department. He has taught law students at Duke; the universities of North Carolina, Minnesota, and Pittsburgh; and Campbell University as Adjunct Professor of Law. He is president of Jury Watch, Inc., a North Carolina trial consulting firm.

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Ambushes & Minefields in the Courtroom

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Appendix B:
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Appendix D:
"The Artful Lawyer: More Show, Less Tell in Opening Statement" ATLA, ***TRIAL***, October 1993, William Bailey

Appendix E:
"Objections" Chapter Nine, ***Modern Trial Advocacy: Analysis and Practice, Second Edition***, Steven Lubet, NITA

Appendix F:
"Effective Closing Arguments in Civil Trials" ATLA, ***TRIAL***, October 1993, Leonard Ring

Faculty Information

Judge Diane Dal Santo

Up until her retirement in 2000, Judge Dal Santo disposed of approximately 1,100 cases each year through bench and jury trials, summary judgment or referral to mediation, as a district court judge in Albuquerque, New Mexico. She designed and successfully lobbied legislation and funding to establish a domestic violence court, co-founded, served on and chaired (one year) the bench, bar and media committee, and was elected by colleagues statewide to serve as President of the State District Judges Association. In 1998, she helped conduct a week long program first in Kazan and then in Nizhniy Novgorod for Russian women judges, law professors and journalists, under the auspices of the National Judicial College. Also at the Judicial College, she developed materials and taught portions of a week-long course on Domestic Violence with 3 other faculty members, once a year for five years. Judge Dal Santo received twelve national, state and local community awards over her judicial career, including, the American Bar Association, National Conference of State Trial Judges, *Award of Judicial Excellence,* in 1996. She received her J.D. Degree from the University of San Diego, and a Bachelor of Arts in Sociology from the University of New Mexico.

Judge Mark Drummond

Judge Drummond has extensive NITA teaching experience, including trial advocacy presentations in England, Holland and Tanzania. He has also given the Corboy Lecture in Advocacy at Loyola University of Chicago and is the author of "Eight Keys To the Art of Persuasion" which he has presented in many locations across the nation. Judge Drummond is an Associate Circuit Court Judge in Quincy, Illinois. He also serves as the Associate Editor of the ABA's Litigation News and as Program Director at Large for The National Institute for Trial Advocacy. Prior to becoming a judge, he had a general trial practice. His JD is from the University of Illinois.

Laurie White

Laurie White is a criminal defense attorney in New Orleans managing four associates and a busy firm. She has served on all sides in the courtroom: from prosecutor to defense, both civil and criminal. She has tried more than 100 cases to juries. She sought the death penalty as a prosecutor and now she handles state and federal appointments defending persons facing a death sentence. Her private practice has served every area of New Orleans. Presently, Laurie is Independent Counsel appointed by a federal court to represent the "public's interest" in a case involving the retrial of an ex-New Orleans Police Officer, who is being allowed to represent himself at the penalty phase retrial although he refuses to present any mitigation evidence on his behalf. This is a case of first impression in the federal courts and is now pending at the U.S. Supreme Court. In 2002 she is the President of the Louisiana Association of

Criminal Defense Attorney's. Laurie participates in numerous trial technique seminars and is a frequent CLE speaker. Laurie received her Juris Doctorate from Southern University Law Center and her undergraduate Bachelor of Criminal Justice degree from Louisiana State University, both in Baton Rouge, Louisiana.

Bryan Harston

Bryan Harston heads the Dallas office of DecisionQuest, a trial strategy, research, and graphics consulting firm based in Los Angeles. Harston is a former litigator and patent attorney with the Dallas-based law firm of Johnson & Gibbs. He holds advanced degrees in petroleum geology and geophysics, and has extensive experience in the communicative arts including documentary video production, computer graphics and design, audio engineering, and 3D animation. Since 1991, Harston has personally consulted on, and created trial presentations for, hundreds of cases in state and Federal jurisdictions throughout the country. Bryan and his team have developed trial presentations for Monsanto, Siemens, Alcoa, Westinghouse, Harley-Davidson, Philip Morris, Ericsson WMX/Waste Management, Bethlehem Steel, and Public Utility clients throughout the nation. He has also been a past participant in Continuing Legal Education Options Network broadcasts in the Master Advocate Institute series.

John Raley

John Raley is a shareholder in the Houston, Texas office of Cooper & Scully, P.C. He is a trial lawyer whose practice areas include Medical Malpractice, Personal Injury Defense, Intellectual Property Litigation and Commercial Litigation. He is *Martindale-Hubbell* AV rated. John is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization. He earned his Bachelor of Arts, *summa cum laude*, from University of Oklahoma in 1981. He earned his Juris Doctor from the University of Oklahoma in 1984, where he was Note Editor of the *Oklahoma Law Review*, and was a member of the Order of the Barristers. He also earned a Master of Laws from the University of Aberdeen in 1988, where he was honored as a Rotary Fellow.

Section 1

Handling Surprises at Trial

John Raley, III
Cooper & Scully
Houston, Texas

With Supplemental contributions by:

Judge Mark Drummond
Associate Circuit Court Judge
Quincy, Illinois

Judge Diane Dal Santo
District Court Judge, Ret.
Albuquerque, New Mexico

Laurie White
Law Offices of Laurie White
New Orleans, Louisiana

HANDLING SURPRISES AT TRIAL

"The best-laid schemes o' mice an' men
Gang aft agley,
An' lea'e us nought but grief an' pain,
For promis'd joy!"

Robert Burns

I. INTRODUCTION

Litigation is like improvisational theater. There are not - and should not be - scripted lines to recite. Counsel have planned how they want their case to be presented. They have ideas how the other side will respond. They have researched the law, and have some inkling what the judge might do with certain evidence. But only God knows what will happen when the trial begins.

Unlike improvisational theater, there is a strong disagreement with the other actors regarding the end of the play. Your opposing counsel does not care about your outline, and is free to approach the case completely differently than you predicted.

Although the Texas Rules of Civil Procedure are designed to avoid ambush, no amount of discovery can completely prevent unexpected witness testimony, new expert opinions, previously unknown documentary evidence, or unanticipated court rulings, any of which could strip you of a claim or defense. It is inappropriate to rely on trial or appellate court protection. Counsel needs to be able to handle surprises at the moment they happen with precision, confidence, and decorum.

Sometimes surprises take the form of helpful gifts to a counsel's case. Opposing witnesses may volunteer information outside their depositions. The court may rule your way on a dispute you did not have high hopes of winning.

There is no programmed format for handling surprise. Like medicine, the practice of law is an art, and responses depend on an infinite variety of circumstances, including the value of the evidence, the ability of opposing counsel, the temper of the court, and the make-up of the jury.

You may move to strike the new testimony or document, or seek a mistrial or continuance. You might decide to change your witnesses or documents to respond. You might choose to attack the credibility of the witness presenting the new evidence.

Regarding unanticipated favorable testimony, you might want to expand on it, or you might want to "seal it off" and leave it just as it is for jury argument.

Trial surprise decisions are sometimes perplexing, and often must be made immediately. Attorneys decide at such moments whether they really want to be trial lawyers. The sting of courtroom battle is anathema to some, to others exhilarating. Thomas Paine's phrase, "[t]hese are times that try men's souls" applies to those lonely episodes in the middle of trial when a lawyer must craft an appropriate response, on short notice, to an unforeseen situation. This paper will, hopefully, provide a few basic guidelines.

II. "THE WILL TO PREPARE"

Bud Wilkinson, who won several national championships during the 1950s at a college north of the Red River, once noted that everyone has the "will to win" on game day. When the band is playing and the crowd is cheering, every player wants to win. But that will, ultimately, does not make champions. The question he asked his players was whether they had the "will to prepare." He wanted to know whether they had the desire to get up early in the morning and train when they were tired and sore and no one could see them but their teammates, or study films and playbooks until they had them memorized, or run plays over and over until they were flawless. Those who have the "will to prepare" are ultimately winners. Trial lawyers who have the will to prepare encounter few surprises in the courtroom.

A. The Facts

Part of the fun of being a trial lawyer is the Sherlock Holmes stage, when you can examine the footprints, sift through cigarette ashes, and try to deduce what happened at a certain time in a certain place. Eyewitnesses view events from their individual perspectives, and may tell completely opposite versions of a story, believing wholly in the truth of their version. Documents may be ambiguous, altered, missing or destroyed. Physical evidence may no longer exist. Before trying to put a spin on anything, trial lawyers are responsible for learning the truth as far as possible.

A mastery of the facts is essential. You cannot plan a trial strategy, or prepare witnesses, or anticipate the approach of your opponent without submersing yourself in detail. I have known trial lawyers who tried to learn the detail of a case during trial. That never works. You cannot even begin a trial (write a motion in limine, conduct voir dire, give an opening statement) without knowing all facts helpful and harmful to your client's case.

Lawyers must distinguish when preparing their presentations between "facts" and "important facts." But they must know all the facts before they can make that distinction.

B. The Law

While facts provide the structure of a case, law is the foundation. You are not prepared for trial if you have not anticipated the legal issues the court may need to consider. You should have readily available concise briefs on the key issues, so you will be able to present them adequately when the time comes.

Some lawyers think little of the jury charge until time for the charge conference at the end of trial. This is often a fatal error. As far as possible, you

should have the charge drafted in advance, including jury issues and instructions you will argue for and compromise positions the court may take. What better foundation for your trial themes can there be than the questions the jury will be asked to answer?

C. Information

"Where is the wisdom we have lost in knowledge?
Where is the knowledge we have lost in information?"
T.S. Eliot

Trial surprises often lay bare a party's lack of organization. It is worthless to accumulate and store knowledge in your files if you or someone on your team cannot find it immediately. Conversely, it is devastating to the other side if you are able to retrieve in seconds the deposition quote or documentary reference that rebuts their new approach. Computers are wonderful tools, if they are programmed and operated correctly. But it is wise to have a back-up plan if they crash. Likewise, someone on your trial team must be able to operate demonstrative equipment, and a troubleshooting crew should be on call on short notice.

D. Your Witnesses

You cannot spend too much time preparing your witnesses to testify. This is one of the areas where a thorough knowledge of the facts will benefit you most. Help your witnesses to tell their stories. Go through the documents with them, and show them how you will use the documents during their testimonies. Give them instructions on proper courtroom behavior.

Most importantly, prepare your witnesses for cross-examination, for this is where many trial surprises emerge. Ask another lawyer in your firm or a colleague to practice cross-examining the witness following your practice direct examination. Get them used to dealing with the facts harmful to your side.

SURPRISE IN DIRECT EXAMINATION
By Judge Mark Drummond, Associate Circuit Court Judge

The best advice to avoid problems in direct examination is like the joke about the young person on the street in New York who asks the older person, "How do I get to Carnegie Hall?" The response, "Practice-practice-practice!" For direct examination, the mantra is prepare-prepare-prepare.

What is a good checklist to eliminate mistakes?

Let me suggest the following-

1. Prepare a proof chart.
2. Go to the courtroom and familiarize the witness to the surroundings.
3. Review with the witness both the content and the order of the examination.
4. Prepare an exhibit notebook to use with the witness.

Let's start with the proof chart. A trial lawyer once told me that she makes what I now call a proof chart for each case. Along the top axis is placed all of the various sources of proof such as the witnesses, exhibits, stipulations, admissions of fact, etc. Along the side axis is placed the points or elements of proof that she needs to show in order to win her case. She then checks the box or boxes formed by the resulting grid if she can make a particular point from a particular source.

For example, in a case where a doctor told a patient that he needed to have rehabilitative therapy after an accident and he failed to do all that was asked of him there may be many sources for that proof. She may be able to get that on cross from the plaintiff himself if he admitted to not attending all sessions in his deposition. She certainly can get it from her expert; perhaps the plaintiff's own doctor or the physical therapist. The point is that for those issues there are multiple sources-some safer than others-some that may be more risky, but could be more effective. She will have many checkmarks for this point.

If, however, she only has one witness to say that the plaintiff was speeding before the accident she will have only one checkmark for that point. This tells her that she had better get that one point from that witness because she has no other source for backup.

The practice of making your case visual in this manner has many uses, but the use for direct examination is that in the stress of the trial it gives counsel a certain level of comfort to know that a point can be made from several sources. It also tells counsel where they need to make sure to get that point from that witness.

Next, the witness needs to know the courtroom. It is a different environment from your office. Think about it; we take witnesses from the security of their homes,

make them walk into an unfamiliar place in front of unfamiliar people, take an oath and then sit in a wooden box where all eyes are upon them and every word is being recorded. All I can say is at least they don't have to stand up in the dock and give testimony as is done by our friends in England.

Realizing that many attorneys don't have the luxury of taking a witness to the actual courtroom during downtime, perhaps the next best thing is to go early so that they can at least see where they will be testifying.

The next thing is to go over both the order and the exact questions you will be asking on direct. The exact language you will use on direct is crucial. Many times especially young or especially busy attorneys will do something like this:

Counsel-"OK, then I'll put you on the stand and I'll ask your name and then some background questions and then I'll have you start your story by putting a red X on a street diagram I'll have with me at trial, OK?"

Witness-"OK"

Then at trial it goes something like this:

Counsel: "State your complete and full name and spell it for the record."

Witness: "Uh, Bill Jones, I mean Bill Theopolous Jones, J-O-N-E-S."

Counsel: "What is your present occupation?"

Witness: "My what?"

Counsel: "Where do you work?"

Witness: "Oh, K-Mart"

Counsel: "What is your present position?"

Witness: "Seated"

The problem stems from the witness being use to us being real people talking a real language in our offices, when at trial they are faced with someone they don't recognize. They do not recognize the person who used to say, "Did you get out of the car?" but now says, "Did you exit the vehicle." Of course, the chief way to solve this is to use plain language in court like you do in your office. However, if you have a constitutional inability to use plain language in a courtroom your witness must be prepared for that.

Your witness will also expect you to follow the order you used in preparation. If you mix up the order you mix up the witness.

Finally, the construction of an exhibit notebook will aid both you and the witness in terms of organization. The last thing you want in the courtroom is for you to hand an exhibit to the witness with a grand flourish while intoning, “I hand you Exhibit A., do you recognize it?” only to have the witness stare intently at it, turn it around, look at the back and then meekly respond, “I’m sorry, I don’t.”

Go through each exhibit with the witness and if any portions of an exhibit is going to be redacted with the approval of the court and opposing counsel then the witness should use that document in witness preparation.

This advice is doubly important if the witness is to mark positions on any demonstrative exhibit. It is absolute death when they get it wrong.

So, how do we handle and react to surprises on direct examination. We have various options for both the victim and the benefactor of the surprise.

The victim can:

1. Ask for a recess and get permission to settle the case.
2. Try to fix it by another question.
3. Ask for a break to talk to the witness-- but know the rules of whether it is fair game for cross.
4. Ignore it.
5. If a non-responsive answer, ask that it be stricken.
6. If it is truly bad ask the jury be instructed to disregard it.
7. If the witness has turned hostile ask permission to lead to regain control.
8. Move for a mistrial if appropriate.
9. Try to fix it on closing.

The benefactor can:

1. Ask for a recess to see if they want to settle.
2. Object if they try to fix it by asking the same question.
3. Object if they ask for a break and, if granted, an instruction that counsel not talk to the witness until cross. If that is not granted, then prepare to cross the witness on what was said during the break. Prepare for attorney/client privilege.
4. Gloat and let everyone in the courtroom know it.
5. Ignore it
6. Ask that the last question and answer be read back, if that request can be made in good faith.
7. Go back to the well and try to get them to say it again on cross.
8. During a break have the reporter type it and have a visual made for closing.

9. If appropriate, move for a directed verdict, summary judgment or partial summary judgment based upon the error.

What the victim and benefactor do is entirely situational. Above is a listing of all the possibilities available to counsel. What you use depends on many factors such as:

1. The size of the error.
2. The age, occupation, demeanor, etc. of the person who made the error.
3. Whether the person is the party, a lay witness or an expert witness.
4. The timing of the error.
5. The makeup of your jury or judge.
6. Whether the error makes a difference only to someone who has gone to law school.

To give a flavor of options the example I will use in the discussion will involve a traffic accident at an open intersection. The issues are whether the defendant yielded to his right. The defendant claims he was already in the intersection and that the plaintiff was speeding. The speed limit is 30 M.P.H. in that area.

Let's say the testimony goes something like this:

Plaintiff's counsel: "What was your speed as you entered the intersection?"

Witness: "35 miles per hour"

Now the witness meant to say 25 m.p.h. This is what was said in the deposition and his statement to the police at the scene.

Several things are going on now. Plaintiff's counsel is thinking, "How can I fix this?" Defendant's counsel is thinking either, "What did he just say?" or "I thought I heard right, but did the jury catch it?" or "He did say it and I want the jury to hear it again."

Plaintiff's counsel's first fix is usually to give the witness a funny look.
If the witness picks up on the funny look you usually get, "Oh, I mean 25 miles per hour."

Now defense counsel has also a variety of simultaneous options available depending on the amount of time which passes between "the funny look" and the volunteered, "Oh, I mean 25 m.p.h." There is a possible objection from defense counsel that the question has already been answered and the add-on is volunteered. It depends upon the passage of time and, remember, the record for the appellate court will not reveal the passage of time. It will appear on the record as one sentence. Counsel with an eye towards an appeal may want to state on the record with a side fight on whether this occurs in front of the jury,

"Your honor, I want the record to reflect that the witness said he was going 35 miles per hour, he had finished his answer and only after a period of seconds went by coupled with "a funny look" by his attorney did he volunteer 'Oh, I mean 25 m.p.h'" Of course then you always have the amusing battle between counsel on the record if that is truly reflective of what happened in the courtroom.

If defense counsel is quick and can ethically claim the following is true she might ask this question, "You honor, I didn't catch that, could I have the reporter read it back."

First of all, counsel must in good faith be able to say that she wasn't sure what the witness said. In many cases of mistake this is true. You are just so surprised you cannot believe your ears. I think it is a mistake to put your question in this form both ethically and tactically: "Excuse me your honor, but did the witness just say he was going 35 m.p.h." First of all you are repeating testimony which some judges would say is ethically impermissible and may get you a tongue lashing and may be tactically unsound since it alerts the witness to the problem and will probably result in a volunteered, "Oh I'm sorry, I meant 25 m.p.h."

Now the judge may or may not know that a mistake has been made depending on whether he or she remembers the issues from the pretrial or from the opening statements. Prudence probably dictates that the questions and answer be read back outside the presence of the jury, but this rarely happens. In any scenario the quick defense counsel has made the point. Whether it is read back or the proceedings merely interrupted everyone now knows something important has occurred. Meanwhile, back at the ranch, plaintiff's counsel is still trying to find a fix if "the funny look" does not work. Several options usually arise. One is "Are you **sure**, you were going **35 M.P.H.!**" Two possible objections are leading and asked and answered. You will get various rulings on that question depending on your judge.

Other options are, "Now you just told this jury you were going 35 M.P.H., is that accurate, (or true), or (a mistake). The objections again are asked and answered or leading and your rulings will be mixed. In any case, counsel is probably going to be able to find a form of question suitable to the court to have the witness say, "Oh, I made a mistake or I'm nervous, I meant to say 25 m.p.h."

In any case counsel will probably be able to fix it on the fly. Only in rare cases is the witness so confused that counsel needs to resort to refreshing recollection with a prior statement for which the foundational predicate must be that the witness does not remember (which does not square with the "I was going 35 m.p.h.) or impeaching the witness with their own deposition. Either case is a disaster and rarely happens at trial, but for the purposes of this discussion I wanted to exhaust all possibilities available. I suppose I could envision the rare case where your client really is the insurance company and the policyholder just wants to get it over with and is uncooperative. They either lose their memory

prior to trial and you must use refreshing recollection or they become antagonistic and you are faced with impeaching your own witness. In some cases you are faced with having to ask the court to declare the witness hostile and then ask permission to lead. At that point it is probably time to ask for a recess and then try to settle the case.

Which brings me to the next option-taking a break. Let's say you can't get the answer out. You can ask to take a break. Opposing counsel should ask for a direction that counsel not speak to the witness during the break. This is usually granted, but the situation is stickier when the witness is the party. I have found courts vary on this, but most then allow the cross examiner to explore what transpired during the break. The key in this area is preparation. Know your rules and your judge on these issues and be prepared to argue, especially if it is attorney/client privilege that is at issue. Even if the court does not allow you to go into what was said to the witness or party during the break it is a win for the defense. On closing the argument is "Ladies and gentlemen, the evidence is clear, before the break he was going 35 M.P.H. and after the break he was going 25 M.P.H.!"

The fix for the plaintiff is probably best met head on. A mistake has been made. If, as in most cases, the plaintiff can coax out the response, "I'm sorry I made a mistake (or I'm nervous) I meant to say 25 M.P.H." then a shot at a fix on closing is the technique of "The jury instruction you will not see." It goes something like this, "Now the plaintiff made a mistake while testifying. He told you about it. He said he was going 35 when he meant to say 25. Now I'm going to show you an instruction you will not see from the judge and it is this: "The plaintiff must not make a mistake while testifying" Ladies and Gentlemen, if this is an issue in this case then the case is over. They win. He did make a mistake while testifying. He told you he was nervous. He meant to say 25 and it came out 35. They say it is the truth, we say it is a mistake. But you will see no instruction that requires people not to make mistakes while testifying. Why? People do get nervous, it is a strange place and they are not use to it. If you are going to judge him on this mistake then the case is over. But if you will concentrate on the instructions the judge give you and decide this case on who really had the right of way then you will be deciding the true issues in this case. Now let's turn to those issues."

Now some judges will not allow you to do "The jury instruction you will not see technique" since their position is that only they give the instructions and you can't even do instructions they will not see due to possible confusion. This, of course, is the defense counsel's objection to this argument. It this is sustained, just take a step back and frame it instead of what is really relevant in this case—a mistake by a nervous witness on the stand or who had the right of way. The effectiveness of this will depend on whether the witness has a valid reason for being nervous such as youth or advanced age or other reasons.

And now back to Mr. Raley's article:

D. Your Witnesses (Continued)

Finally, it is often useful to take clients and key witnesses to the courtroom where the case will be tried a day or two before the trial, so that they may see the stage where the drama will take place. Find a time after-hours, when the court is empty, and request the clerk's or bailiff's permission to let the witness sit in the box, see you in the position where you will be during trial, and practice answering questions. If you do this, your witnesses will have a comfort level that will steady them somewhat during trial.

E. The Courtroom

Apart from witness preparation, I think it is essential for counsel to visit the courtroom prior to trial. Again, this is best done after-hours, when you can do such things as sit in various positions of the jury box and think about where to place your demonstrative exhibits, and where to stand when using demonstratives in jury argument and witness examination.

F. The Judge

Every judge has his or her unique way of presiding over trials. Before trying a case, gather as much knowledge as possible on your trial judge's likes and dislikes, mannerisms, and idiosyncrasies. Is the judge a stickler for time limitations? How does the judge handle pretrial motions? Must exhibits be pre-marked? Some judges don't allow a description of the case in voir dire, others do. Some judges hate speaking objections, and will criticize counsel in front of the jury for making them. Some judges allow what appears to be closing argument in opening statement, others keep a tight rein on such antics.

The local bar association may have a bench book containing the judge's individual pet peeves. Talk to lawyers that have tried cases before the judge, the more recent the better, since characteristics change over time (particularly with new judges). If you are polite and respectful, you may gain information from the judge's staff, but remember that whatever you ask may be repeated, perhaps inaccurately, to the judge. If you have an important, unanswered question, ask the judge in pretrial conference. It is better to do it then than be called down in front of the jury.

It has been said that the best way to win an argument is to start out being on the right side. Similarly, the best way to handle surprises at trial is to prevent them from happening. Having the proper "will to prepare," is the key.

SURPRISES AND ERRORS THAT HAVE CRIPPLED CASES IN TRIAL

By Judge Diane Dal Santo, District Court Judge, Ret.

1. Trial work is a learning experience.
a. learning from other attorney's mistakes is better than learning from your own mistakes.

2. Some common mistakes attorney's make:
a. failing to establish jurisdiction
b. failing to make a motion for a directed verdict when plaintiff or prosecutor fails to establish all elements of all the allegations

3. Never take on the trial judge in front of the jury: when you are upset with the trial judge's ruling(s), ask for a recess to address them—do not take on a judge in front of the jury--- the following is from State of New Mexico v. Charles Driscoll, 89 N.M. 541 (N.M. 1976), 555 P.2d 136:
"In his opening statement to the jury in a criminal case in which his client was charged with two counts of robbery, Driscoll, in referring to a lineup identification of his client by three victims of the robberies, stated that one such victim had failed to identify the client…,the second identified the wrong man…the third identified the client…but…did not want to prosecute…
Prosecutor: Your Honor, I move for mistrial
Court: Mr. Driscoll—"
(Mr. Driscoll continues with his opening, while the Judge calls his name two more times)
"Driscoll:…that's a subject for cross-examination and impeachment of the witness…and I intend to present evidence—
Court: Don't argue with me Mr. Driscoll…
Driscoll: I am not going to continue. I have nothing more to say to the jury…and I respectfully except to the threatening attitude and gestures of the court. I feel that I am being harassed and I find it difficult …to adequately represent my client. The Court is obviously laboring under extreme emotion. I think the Court is completely wrong in its ruling and I want that entered and made a matter of record…and…ask for a recess at this time.
Court: No, I am going to declare a mistrial…take Mr. Driscoll directly up to jail…the jury will be excused from—
Driscoll: You are not going to do it by force and I mean by force. I AM NOT GOING!
(Driscoll removes coat, tie, throws glasses and pencil on the floor; walks toward the bench; then walks over and stands at the end of jurybox…)
Court: The jury will be excused. Mr. Driscoll get away from the jurybox."
Eventually, Driscoll lays down on the floor and continues to request people in the courtroom watch the violence perpetrated on him and is finally dragged out by some sheriff deputies. The judge gets the names of everyone in the courtroom in

case they are needed as witnesses for a hearing and brings the jurors back in to tell them they were excused from jury service.
"Court: …all of you saw what happened, not all of but at least the start of it, didn't you? (Jurors nod affirmatively)
Juror O'Brien: I thought he was going to hit you.
Juror Wells: He was really mad….
Court: Did it appear to you, Lee (juror O'Brien) that he was going to attack me?
Juror O'Brien: Yes, indeed it did.
Juror Wells: Yes, he looked like he was mad.
Juror O'Brien: I thought so because he got up, ripped off his coat…and started approaching you…If he'd gone to the other side, I don't know what would have happened."
Eventually, there was a contempt hearing by another judge of the District Court where Driscoll was found in contempt, appealed and affirmed by the Court of Appeals, appealed to the Supreme Court, which reversed the other courts.
The moral of the story is: Jurors always side with the Judge. If they see you get mad at the Judge and particularly if the Judge gets mad at you…you will lose your credibility with the jury.
Mr. Driscoll eventually stopped trying cases and became a Catholic priest.

4. If you cannot stop yourself from asking "Why," be sure you can deal with the answer
Attorney's often seemed compelled to ask that one extra question. Every expert says you should not do it. I am reiterating it one more time, just in case this time it takes.

5. When you have made your point, leave well enough alone and move on.
This is closely related to point # 4. In an effort to push a witness just a little bit more you might get something you didn't expect.

6. Successful trial attorney's:
a. are respectful to opposing counsel
b. maintain sanity in the midst of insanity
c. are aware of their body language
d. use straightforward, simple language and ideas to successfully communicate to the jury
e. don't feel as though they have to impress the jury, they don't find it necessary to speak about themselves in the third person
f. are respectful, if cool, to adverse witnesses---juries notice this and think 'if the attorney isn't hostile or upset about this witness, the witness must not have important information'
g. make a point in addressing jurors (during voir dire), witnesses, opposing counsel, court personnel by their correct names, pronounced correctly and preceded by Mister, Misses, Miss, Doctor, etc. . Many attorneys make the mistake of calling a potential juror by their first name, they may intend to seem friendly, but are perceived as being too intimate or offensive. During voir dire

some attorneys have addressed men in the panel by 'Mister' and the women by their first names. This does not go unnoticed by every woman and a lot of men who may end up on your jury. Regarding difficult or unfamiliar names, every one appreciates an attempt to pronounce their name correctly. If you are stumped, you will gain credibility points by asking how the name is pronounced---then write it down phonetically.

And now back to Mr. Raley's article:

III. SPECIFIC SURPRISES

A. General Rule

A professor of mine once quipped that: "all generalizations are wrong." Certainly there are exceptions to every "rule" about trial tactics, but this one is as solid as they come: Do not act surprised in front of the jury. Never reveal for an instant that you are not completely in control. Remember that the jury looks to you for clues to how they should view evidence. Stay calm. No matter what happens, you can and will handle it. The jury may not remember specific evidence during deliberation, but they will remember how you react. There are times in trial for nonchalance, times for self-depreciating humor, and even times for indignation. There is no time to look down, cover your eyes and shake your head. In no way should you reveal any hint that something horrible and unexpected and important just happened. The clueless, bewildered lawyer has lost the case before deliberation begins.

The strength to do this correctly must come from within. If you know the facts and the law like you should, you will know whether to object and how to do it. You may want to approach the bench. You may choose not to object, and respond with evidence of your own. Never forget that the jury's image of you and your client, their perception of whether you are good people who should be believed, or shady people who should be punished, is more important than the legal effect of the trial surprise which just occurred.

The paragraph above presumes that the surprise was negative. Many trial surprises are positive. The same rule applies. Do not be jubilant or euphoric. If anything, make it seem as if the favorable event makes complete sense, because it is consistent with your view of the case. If the event occurs while cross-examining the other side's witness, strategies include (1) pausing long enough for the jury to absorb the answer (at the risk that the witness may try to explain - which sometimes digs a deeper grave) (2) repeating the answer to drive it home a little more (same risk) (3) inquiring further about the area (dangerous because you are walking a tight rope without an impeachment safety net), or (4) the safest practice - "sealing off" the testimony by changing the subject. Let the other side try to rehabilitate, if they can. Order the transcript for use on closing argument.

Many lawyers miss helpful surprises during cross-examination because they don't listen. Don't be so bound to your outline that you miss the nuggets given you by the other side's witnesses. [Q: "The accident happened at 9:00 p.m., correct?" A: "Well, I had been drinking whiskey all afternoon, and scored a little coke around 8:30 p.m., so I guess you're right." Q: "It was dark, wasn't it?"].

B. Voir Dire

Sometimes members of the jury panel are overly talkative and extremely biased. Be careful not to allow their responses to poison the jury panel. Be polite, but firm ("Thank you Mr. Smith for your candor, does anyone feel otherwise? Why do you feel that way?"). Most judges will not allow a bench conference regarding individual jurors until the end of voir dire, so it is safest to move the discussion away from an outspoken, prejudiced juror. A maestro play is to use the juror to educate the others, then move to strike the juror for cause later. If the court denies the motion, you must use a preemptory challenge on the juror.

In several trials, I have encountered jurors whose opinions were so completely bizarre that both sides agreed to a dismissal for cause. Look for such opportunities.

Voir Dire

By Laurie White, Law Offices of Laurie White, New Orleans

The key to picking your way through the minefield that is voir dire is to carefully phrase your questions, listen closely to the answers given, and, above all, request an individual voir dire if a potential juror drops a bomb and then challenge the prospective juror. It is critical to make specific challenges and specific objections. The most important things to do are preserve the record, protect your client and try not to look foolish in this uncomfortable exchange you are forced to enter into with complete strangers.

Jury selection is more a matter of instinct and experience than legal rules. This is the time that the attorney can use the process not just to exclude jurors, but to tell them something about you and about the case. But expect to learn amazing things from these prospective jurors because "jurors say the darnedest things." An attorney must learn to condition their responses so that surprise, shock, happiness or disgust is not reflected. Some attorneys choose a comfortable phrase to speak in response to jurors, such as "How interesting" or "Thank you for your candor" or, my favorite, "How's that work for you?" The use of such a phrase allows an attorney to not exhibit a personal derogatory or improper response while perhaps shutting
that juror down or allowing the juror to explain further.

Federal courts have broad discretion as to what voir dire they will allow. They must, however, allow the questions necessary to test for prejudice. Consequently, to advance a theme, case, and hopefully, win the trust of the jury for you and your client, this is "first impression" time where jurors make an assessment of your case via "you."

Federal Rule of Criminal Procedure 24(a) gives the court discretion to allow attorney-conducted voir dire. Taking control of voir dire yourself allows deeper inquiry from your perspective. The Fifth Circuit has held that if a criminal defendant requests an inquiry into racial or ethnic prejudice, the court must allow her/him to do so. Failure to grant the request may or may not be reversible error. U.S. v. Erwin, 793 F.2d 656 (5th Cir. 1986). See also Ham v. South Carolina, 93 S.Ct. 848 (1973). (When defendant timely requests individual questioning of a prospective juror on the basis of racial prejudice for good cause, trial court must grant it.).

If the court determines that pretrial publicity may have a prejudicial effect on a potential jury, the court may mitigate these effects through one of four vehicles: (1) continuance; (2) expansion of voir dire; (3) foreign venires; (4) change of venue. There are however, pitfalls with each option.

A continuance, for example, may conflict with the defendant's right to a speedy trial. It may also backfire: prospective jurors' memories may not diminish, especially is publicity continues. Expanded voir dire, or asking more probing questions of a prospective juror on an individualized basis, may not provide any more information than a regular group voir dire. A foreign venire may put a burden on transplanted jurors, who are often sequestered to avoid exposure to the very publicity that infected the local pool. Counsel should also be aware that judges are not supposed to inform the venire which party requested their sequestration, so as to avoid any resentment from the venire.

Listed below is a limited overview of some Louisiana cases:

State v. Fourchy, 25 So. 109 (La.,1899). Held: A juror is subject to challenge for cause where his answers on his voir dire to questions propounded by the judge, differing from those first given showing him utterly incompetent, were given after the judge had threatened him with contempt proceedings because of his original answers.

State v. Thompson, 489 So.2d 1364 (La.App. 1 Cir.,1986). Held: Challenge for cause should be granted, even when prospective juror declares his ability to remain impartial, where juror's responses as whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably inferred. This was a second degree murder case in which a challenge was

denied against a juror who not only knew the victim, he lived in the neighborhood of the victim and the murder scene.

State v. McIntyre, 381 So.2d 408 (La.,1980). Held: Party challenging juror on ground of his relation to participant in case must also show that relationship would influence jury in arriving at verdict. Here, a prospective juror knew the District Attorney's former senior partner and thought him "a fine man." The challenge was denied.

State v. Albert, 414 So.2d 680 (La.,1982). Held: Trial court should sustain challenge for cause despite prospective juror's professed impartiality if his answers reveal facts from which bias, prejudice or inability to follow the law may be reasonably implied. This was a first degree murder case in which a prospective juror confessed that he may have trouble being impartial because his brother was murdered 13 years previous. The judge subsequently rehabilitated him and the challenge was denied.

In short, jury selection can provide the biggest surprises in a trial, and it is the best time in the courtroom to test your psychological instincts and your cocktail party skills at learning about that possible juror.

Communicating with the Jury and Avoiding Mistakes: Opening Statements and Closing Arguments

By Judge Diane Dal Santo, District Court Judge, Ret.

Never underestimate the power of persuasive opening statements and closing arguments. Trial experts, many lawyers and judges contend the quality of openings and closings are critical to the success or failure of a case. In reality a lot of trial attorneys spend little time preparing them. Trials demand time with witnesses, jury instructions and pretrial motions. Many trial attorneys use the night before the start of the trial to prepare their opening statements. Likewise, by the end of trial, exhaustion and relief interfere with preparing closing arguments. If this is your practice, take note. ***Avoid making the mistake of last minute preparation .*** Begin your openings and closings early in the case. Revise them during discovery and witness interviews. Make summaries of what each witness brings to the trial shortly after you have interviewed or deposed them. It will help you keep focused. Use this section and outline as a checklist to assist you. Avoid common mistakes and win your case with strong and persuasive openings and closings. The few, but important, differences in civil and criminal cases will be noted.

OPENING STATEMENTS

Never forget the value and purpose of the opening statement. It is the time the jury is most attentive and most willing ***to view the entire case through your perspective***. Make the most of this opportunity.

1. Theme

a. from the very beginning, begin your theme- a good theme is clear and concise- if possible, use a memorable recurring short sentence you can repeat to the jury, such as: " this case is an example of being in the wrong place at the wrong time" or "this case is about a company that ignored their own employee's observations so they could continue to make big profits"

b. practice your theme and eliminate unnecessary information -- tell the story to your colleagues, family and tolerant friends-the more you tell it, the more you will perfect it, be comfortable with it and make it come alive

c. do not forget facts that prove the legal elements you must prove

d. be brief and concise, never tell the jury about evidence or facts you are not absolutely certain will be supported by testimony

e. practice your opening from the day the case is set for trial until the day you give it

f. never forget jurors are not legally trained, use common words that the jurors can understand

2. Organization

a. well organized and understandable opening statements relate events and facts in order of occurrence, this helps avoid jury confusion

b. sort out superfluous information from openings or risk juror confusion

c. capitalize on the theory that ***best remembered information is presented first and last***

3. Using persuasion

a. give the jury a view of the case that is favorable to your client, use bias but be careful to make it sound objective

b. consider how to best address problems in your case

c. help the jury visualize key points, which informs and persuades

4. Body language

a. experts believe nonverbal communication is as important as verbal communication

b. eye contact should be made with the jurors but avert your gaze after a few seconds –long eye contact will make the juror uncomfortable—no eye contact will make you appear insincere

c. during your delivery of opening maintain a distance of 4-12 feet from the jurors

d. facial signals should be consistent with your words or you will appear deceptive

e. stand upright and erect to signal confidence and trust

f. leaning slightly forward signifies matters of importance

g. do not pace during your opening because it signifies uncertainty

h. learn the importance of body language

5. Sharpen your speaking skills

a. define key legal terms

b. use terms and phrases that are powerful, yet clear and have common meaning, without being condescending, avoid legalese

c. know the names and the correct pronunciation of the names of witnesses and opposing counsel

6. Always use visual aids

a. visual aids attract the attention of jurors and help them become involved

b. use visual aids even if it is only a simple diagram, chart or other demonstrative aid

c. file a motion well in advance of trial requesting the use of visual aids, if necessary, subpoena witnesses to lay a foundation for the visual aid

d. visuals help jurors follow what is being said

e. jurors are more likely to believe what they can see over what they can only hear

f. when you use a chart or diagram, make sure the jurors can see it

7. Request ground rules from the judge* regarding:

a. will time limits be imposed

b. is there a problem using visual aids

c. does the court have a policy about objections made during opening statements

d. ask other attorneys about the judges "idiosyncrasies"

8. try to avoid objections by opposing counsel during openings by playing professionally

a. do not argue the case

b. avoid sensitive issues, such as punitive damages in civil cases, or evidence that may be inadmissible, such as character evidence in criminal cases

c. prosecutors risk a mistrial, their credibility, the judge's anger, or losing a case on appeal by speaking about evidence that may not be available or admissible, such as, commenting on the defendant's failure to speak to the police or implying s/he should testify during trial

9. Never waive opening statements

a. remember this is your opportunity to persuade the jury to see the case through your perspective

b. do not waste time or lose juror's attention by explaining the purpose of the opening statement or other unnecessary information about the history of the trials in the United States, etc…..it makes you look like you don't care about your case or you don't have a case

*The trial court guidelines for trial counsel in the US District Court of Oregon state "Confine your opening statements to what you expect the evidence to show. It is not proper to use the opening statement to argue the case, instruct as to the law, or explain the purpose of an opening statement. Unless the case is unusually complex, the average time should not exceed 30 minutes."

CLOSING ARGUMENTS

1. Return, restate and reinforce your theme briefly

a. statements you want the jury to remember should be stated first or last, it is important to start strong and end strong.

b. point out the evidence that supports your case in a logical manner, such as, the order it was presented during the trial

2. Follow your organization , use redundancy to reinforce your theme

a. relate the facts in the order you used in your opening, the order you used for your theme, which varies the presentation and gives the jury another way to see how the evidence supports your theme

b. show the jury how the evidence supports or proves your theme

c. connect the testimony to your theme

3. Use the jury instructions, tell the jury what they mean, and how they connect the dots between your theme, the evidence and the law, varied redundancy reinforces your case

a. explain the instructions in an understandable and accurate manner in language non-lawyers can understand….always-do not make the mistake of letting the jury try to guess what the instructions mean during deliberations.

b. connect the theme, the testimony and the law-show the jury how the evidence establishes each element.

c. pay particular attention to instructions on burden of proof and elements instructions-tell the jury the connotations, combinations and the common meaning of the instructions

4. Do not ignore the strengths and weaknesses of your case

a. highlight the strengths of your case by using analogies--analogies, once reasoned through by the jurors and accepted as appropriate, will result in the jurors holding their conclusions more firmly than if you simply told them the conclusions

b. give the jury information that will help them resist persuasive arguments from your opponent

c. give the jury plausible explanations for the weaknesses of your case and move on--if possible, put the damaging or weak evidence if the best possible light—this will defuse their strength when addressed by your opponent--deal with weaknesses but don't dwell on them

d. always reinforce the credibility of favorable witnesses

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5. Do not ignore the strengths and weaknesses of your opponent's case

a. remember credibility includes: bias, prejudice, interest, lack of truthfulness, the ability and opportunity to observe, memory, manner while testifying and the reasonableness of the testimony-- point out contradictory or inconsistent evidence in your opponent's case

b. overstatements made by the opposition in opening statements should be pointed out

c. try to anticipate opponent's arguments, raise them and defuse them

d. forewarn the jury of anticipated persuasive points opposing counsel will raise

6. Body Language

a. distracting or inappropriate gestures weaken the impact of your words, such as, pointing, putting your hands on your hips or in your pockets, biting on a pencil or covering your mouth with your hand or fingers--you may move from the podium to demonstrate critical events--however, plan how you will move--use your movement to increase the juror's understanding, not distract them

b. watch the jury closely, the ability to read their body language will help you know when you need to reinforce a point or move on—make eye contact with the jury

c. counting off points on your fingers indicates logic

d. if possible, film yourself at some point before trial to view and analyze what you are telling the jury by your body language

e. body language differs with different cultures

f. move from the podium in closings

7. Use physical evidence and demonstrative evidence

a. have any physical evidence, charts or other visuals nearby, so you know where they are and you can reach them gracefully--void looking sloppy or disorganized by searching for them during argument, bending over or turning your back to the jury

b. the jurors will remember best what you can tell them and show them--make it interesting--use charts and graphs to highlight important points--use timelines to help the jury understand your theme

8. Speaking skills and rhetorical questions

a. speak in a powerful and confident manner

b. most trial experts believe rhetorical questions can be very persuasive if skillfully done--don't ad lib on them or they could backfire--if used, they should focus on important issues and be well constructed

c. be sincere, if you don't absolutely believe what you say, the jury won't either

d. use your emotions appropriately--extreme emotional language is counterproductive

9. Again, request ground rules from the judge

find out in advance if the court will impose time limits , if so, does the limit include rebuttal time

10. Avoid objections during your closing argument, and worse, avoid being interrupted by the judge

a. never assert your personal opinion about the credibility of a witness

b. never discuss your personal knowledge of a fact in issue

c. never argue facts not in evidence

d. criminal attorneys should never express their opinion on the guilt or innocence of the accused

e. prosecutors should never, ever mention or comment on the defendant's silence—doing so may result in a mistrial and will definitely be raised on appeal

f. criminal defense attorneys should never attribute the crime to another person unless warranted by the evidence

g. it is improper for attorneys to divert the jury from it's duty to decide the case on the evidence by injecting broader issues outside the case

h. criminal attorney's should never bring up, suggest or infer the penalty or possible consequences of the verdict

i. never argue the "Golden Rule" i.e. do unto others as you would have them do unto you

11. Should you object during your opponent's closing argument?

a. check your state's case law-to preserve your objections on appeal, determine if your objection must be contemporaneous or can be put on the record during a recess

b. consider the value of interrupting just because you can--remember the jury may become annoyed by constant interruptions

REBUTTAL / FINAL CLOSINGS

1. always use this opportunity

2. rebuttal is confined to addressing argument made by opposing counsel

And now back to Mr. Raley's article:

C. Unexpected Witnesses

If the other side attempts to call a witness that has not been properly identified under the rules, move to strike. Under Rule 215, Tex. R. Civ. P., a party should not be allowed to present evidence which the party was under a duty to disclose in discovery, unless the trial court finds good cause. The burden is on the party offering the evidence. Likewise, undisclosed rebuttal witnesses should not be permitted if the party offering the witness was not surprised by the other party's presentation.

Occasionally, an obscure witness in a large case may be called by your opponent. The witness may have been properly identified, but you have not

deposed or even interviewed the witness. Civil lawyers used to handle these situations much more often, and criminal lawyers still do. I like to draw a vertical line down the center of my note pad and take notes of the direct examination on the left side of the page. When a cross examination point arises, I draw an arrow across to the right column, and write the point down. Two or three cross examination points, hopefully that you can back up through documents or other testimony, is often the best you can do. Sometimes there is wisdom in asking no questions at all, in a dismissive sense, as if the witness' testimony was meaningless. Remember that you normally do not have impeachment material regarding such witnesses, so if you weigh in too much your cross might denigrate into an argument, which the jury will hold against you.

Look for creative solutions. One time, the court took a morning recess shortly before the direct examination of a witness that had not been deposed or interviewed. When the jury was excused, I walked up to the witness, introduced myself, and asked to talk to him. He curtly refused, and walked away. My first questions on cross reminded him of the encounter and pointed out to the jury that the reason he didn't want to talk to me was because he believed his job was to help our opponents in the trial.

D. Unexpected Documents

Under Rule 215, the use of documents that have not been produced in response to proper requests should not be permitted. Courts vary on whether to allow use of documents which have been produced, but were not listed in pretrial exhibit lists. At a minimum, the other side should have a good reason why the document was not listed.

Unfortunately, there are often dirty tricks in this area. Do not agree to the admission of an exhibit you have not reviewed thoroughly. If you have not seen the document before, you will be excused for taking your time. There may be hearsay within the document, or other objectionable material. Once the document is admitted, it is too late to object.

Be sure and review each page of the exhibits one more time before they go to the jury room. In one of my recent trials, the opposing counsel had circled in pen a certain medical condition in the hospital chart.

E. Objections

Most jurors don't like objections, even though they are used to seeing them on TV and in the movies. If you object too much, they may think you are hiding significant information. Further, objections call attention to the matter upon which the objection is based. Instructions to disregard are of limited efficacy.

If, however you can in your objection show that the other side is not following the rules, or otherwise not being fair, objections may be quite valuable. Objections that indicate that the other side is wasting time are also useful. Finally, if you think opposing counsel will have difficulty responding to your objections and getting back on track, legally appropriate objections may be advantageous (but don't overdo it or you might make them sympathetic).

A trial lawyer's dislike of objections must be tempered by an appellate lawyer's love of objections - and rulings. I remember a judge at a recorded bench conference saying to my opponent: "Do you really want me to rule on that? Because if you really want me to rule on that, you might not like the answer." My opponent, picking up the not-so-subtle hint, told the court that no ruling was necessary. In doing so, he threw away an appellate point.

F. Rulings During Trial

1. When The Other Side's Objection Is Sustained

Few things are as frustrating as the judge ruling incorrectly (i.e. against you) while you are in the middle of driving home a key point. You have researched the issue and you know what the judge should do, but the judge doesn't follow your plan. The judge may, for example, sustain the other side's objection without appearing to give it much thought. This makes the other side appear knowledgeable, while you appear to be violating the rules in an obvious fashion. The air has been let out of your balloon.

Do not look stricken in demeanor. Do not beg or plead in front of the jury. Be polite, but firm in your response.

a. Think whether there are other ways to prove the critical facts.

This is where your preparation pays off. When getting your case ready for trial, it is good to have some degree of redundancy. You can always streamline during trial, and not call all the listed witnesses or use all the listed documents. But it will be very difficult to add witnesses and documents in order to respond to a sudden adverse ruling. For example, if certain portions of your expert's testimony are excluded, do you have other experts whose testimony you could insert in place of the excluded testimony? Consider whether a fact witness could give relevant opinion testimony. There is certainly no harm in trying.

EXPERTS & SURPRISE
By Judge Mark Drummond, Associate Circuit Court Judge

With regard to experts, and especially hired experts both judges and juries are less inclined to give them the benefit of the doubt on mistakes. I have seen cross-examinations on misspellings in reports or mathematical errors which were very effective, coupled with a shot on closing, "He has a PhD. From Harvard but he still can't add." The lesson is counsel must make sure there are no mistakes in expert reports that will be used at trial. All spelling, grammatical and mathematical errors should be corrected (within ethical bounds) prior to trial. If they are not, they will come back to haunt you.

With that proviso the rules for surprises with experts are similar to those for lay witnesses. The experts are simply held to a higher standard.

And now back to Mr. Raley's article:

b. Look for ways to return to the subject matter.

Ask the questions in a form the judge may allow. In doing so, you will need to balance the risk of being dressed down in front of the jury against the critical nature of the evidence.

c. Use trial briefs.

If you cannot sway the judge during a bench conference, request permission to brief the issue and present it to the court outside the presence of the jury. Most fair-minded judges will allow this. If you are unable to persuade the judge that the ruling is erroneous and damaging to your case, make sure you have created a proper record for appeal.

2. When Your Objection Is Overruled

It is undignified and demeaning to grovel to the court in front of the jury ("But your honor...please..."). Make sure you have stated plainly and concisely the legal basis of the objection. If you haven't, do so. If you have and your objection has been overruled, move along. If it is an important point, and you believe error has been committed, make a bill of exceptions at a recess. Consider whether to file a trial brief.

3. When A Surprise Court Ruling Favors You

Sometimes the judge will let you get away with something on the line or maybe even over it. ("Don't tell us what the doctor said, just tell us what your understanding of your condition was after you talked to the doctor.") Many trial lawyers like to walk right up to the line, not particularly concerned with whether

they may be creating error. They know that many cases settle between the trial court and the appellate court stages. When they obtain unexpectedly favorable rulings, they act as if that was part of the plan all along.

If you have succeeded in excluding a key part of your opponent's testimony, remain vigilant in resisting attempts by your opponent to "go back to the well." Move to strike volunteered testimony in violation of the ruling.

4. Inappropriate Judicial Conduct

By Laurie White, Law Offices of Laurie White, New Orleans

Oliver Wendell Holmes said that the ultimate goal of jurisprudence is prediction. However, in the realm of judicial behavior, prediction may be the hardest task of all. It can be extremely difficult to ascertain what exact factors motivate a judge. No matter how impartial and objective a judge professes to be, he or she may very well be subconsciously driven and influenced by moral and social attitudes.

And now back to Mr. Raley's article:

Some judges engage in non-vocal behavior which could adversely effect your case. I have seen judges roll their eyes, laugh, and play with their computers during important testimony. Most of us have experience with judges who shout at or criticize counsel or witnesses in the presence of the jury. If this sort of thing happens, and you feel your case is being prejudiced, request permission to approach the bench, and in your most professional fashion inform the judge that the behavior is hurting your presentation. Some judges may not be fully aware of what they are doing, and may apologize and cease the conduct. If the conduct persists, you must decide whether it rises to the level to require you to preserve the record through objections. If at all possible do this outside the presence of the jury.

By Laurie White, Law Offices of Laurie White, New Orleans

The key to controlling judicial behavior is getting it on the record for appeal. This is a lot easier than it sounds, because, by specifically objecting to a judge's behavior, you run the risk of incurring the wrath of the judge. It is also a judgment call whether you want to do this in the jury's presence. Preserving any inappropriate behavior for appeal may not ensure a different ruling, however. As the following overview reveals, appellate courts vary on what types of behavior are allowed (and thus are not always grounds for reversal) and what behaviors are so egregious as to taint the entire proceedings below. The important thing to remember is that you may not complain on appeal if you do not face the "Dragon in the Courtroom" by making an objection. An attorney must be courageous enough to know when the trial judge is legally

inaccurate in his/her comments, rulings and actions. The following are examples of inappropriate judicial conduct that never would have be reflected in an appellate decision if the trial lawyer had not had the constitutional fortitude to speak up when the judges in these cases acted in these various manners:

Jenkins v. U.S., 380 U.S. 445 (1965). Held: Trial court's admonition to jury "You have got to reach a decision in this case" was held to be coercive and case was remanded for new trial.

U. S. v. Hickman, 592 F.2d 931 (6th Cir 1979). Held: Trial judge's refusal to permit defense counsel to reserve his opening until after the presentation of the government's case represented one of many reversible errors:

"[H]e would Sua sponte interrupt a witness or counsel, with the words "objection sustained" and then proceed to state why the witness' particular testimony was in some way objectionable. It apparently never occurred to the district judge to either wait for an objection, or to call counsel up before him out of the hearing of the jury and admonish them....After a brief colloquy at the bench, the court largely took over examination of the witness for an additional six pages of transcript. Not satisfied, the district judge then took over cross-examination entirely by himself for more than ten additional pages."

Quercia v. U.S., 53 S.Ct. 698 (U.S. 1933). Held: Trial judge was way out of line and committed reversible error when he charged the jury: "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie."

United States v. Dellinger, 472 F.2d 340, 385- 391 (7th Cir. 1972). Held: Outright bias or belittling of counsel is ordinarily reversible error.

Allen v. State, 276 So.2d 583 (Ala. 1973). Held: A judge's facial expressions can indeed be prejudicial, but do not per se rise to the level of grounds for reversal.

"Appellant strenuously complains of facial expressions and hand movements by the trial judge which are said to have displayed bias against him. The following exchanges took place between counsel and the court:

MR. BARNETT: I would like to make note at this time that in several instances Your Honor has, from facial expressions and hand movements, has indicated disgust with the questions in this particular case, and I would like to note my objection to that.

THE COURT: Your objection is noted. I can't do too much about my face, Mr. Barnett. And if you don't want to see me kind of wince, don't ask the same question three times.

MR. BARNETT: All right, sir. I object to Your Honor's continual facial expressions of disgust in overruling my objections with the intimation and the information that they are frivolous."

"The trial judge is a human being, not an automaton or a robot. He is not required to be a Great Stone Face which shows no reaction to anything that happens in his courtroom. Testimony that is amusing may draw a smile or a laugh, shocking or distasteful evidence may cause a frown or scowl, without reversible error being committed thereby. We have not, and hopefully never will reach the stage in Alabama at which a stone-cold computer is draped in a black robe, set up behind the bench, and plugged in to begin service as Circuit Judge. . . .We have little doubt that facial expressions, gestures, and nonverbal communications which tended to ridicule defendant and his counsel, could, standing alone, operate so as to destroy the fairness of a trial."

This case example shows that the trial lawyer courageously yet carefully made a record of what was occurring even when it was nonverbal courtroom demeanor inappropriate for the trial court to exhibit. There is no doubt that that attorney never anticipated such treatment from the trial judge he began that trial.
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People v. Jones, 447 N.E.2d 161, 173-174 (Ill. 1982). Held: Trial judge's comment to defendant in jury's presence "I wouldn't hesitate to sentence you to death" held not to be reversible error.

Milhouse v. State, 529 S.E.2d 490 (N.C. App. 1985). Held: Reverses precedent holding a judge's vocal inflections and use of tone not to be reviewable on appeal.

Billeci v. U. S. 184 F.2d 394 (D.C. Cir. 1950). Held: Roadmap for getting inappropriate judicial behavior on the record:

"It is our view that if the intonations and gestures of a trial judge are erroneously detrimental to a defendant in a criminal case it is the duty of counsel to record fully and accurately, at the time and on the record, although not in the hearing of the jury, what has transpired. In such a situation it is as much his duty to make that record as it is his duty to record his objections to the charge, as the Rules require, before the jury leaves the room. If the representations then made by counsel are not accurate, the court may say so. But if there is a serious question as to whether the jury may have derived some unintended meaning or have been likely to infer erroneously from the gestures and intonations of the judge, he should emphatically instruct them so as to remove any possible erroneous impression from their minds."

When a trial judge is verbally abusive, uses derogatory language of a personal nature to counsel and her client, or acts in any other inappropriate or embarrassing manner, it is suggested that patience, professionalism and courtroom decorum never be traded for the same demeanor in response. It has been my practice to always become quiet, polite, conciliatory and make the record. You will leave the courtroom looking like a professional.

And now back to Mr. Raley's article:

G. Trial Testimony

1. Your Client Or Witness Goes "Deer In The Headlights"

Sometimes witnesses get on the stand, look around the room and realize they are the center of everyone's attention. Suddenly, they cannot remember their own name, let alone the facts they are supposed to testify to. Stay calm. Do not distance yourself from the witness through anger or frustration. The jury may not have a negative image of the witness at all, indeed they may be sympathetic. But if you are negative toward the witness, they will be also.

If the court permits a short recess, encouragement by you may bring them back. If a recess is not a possibility, stay away from difficult issues for awhile until your client or witness feels more comfortable answering questions. If you feel the need, go ahead and ask gentle leading questions. The other side may not object, and even if they do the court may allow it as transitional. Work on background issues until you see their strength increase, then return gradually to more difficult areas. Clarify prior testimony if necessary.

2. Forceful And Non - Responsive Opposing Witnesses

All the cross examination rules become more important in such a situation. Ask crisp, pointed questions - and have impeachment deposition quotes or documents ready to spring the moment the witness strays. Impeachment is very damaging to credibility if (1) it is on a key point, and (2) the prior statement is completely different. Unless both these elements are present, be careful with impeachment. Lawyers who seem to be giving a "pop quiz" to witnesses with trivial points from their depositions seem unfair.

Stay in control - with your bearing, with your mannerisms, with your voice, with your personality. But don't get into an argument with the witness. Even if you win, you will lose in front of the jury. If the witness is blatantly unresponsive, request the court's assistance. If the court is unwilling to give assistance, tighten your questions further so there is no room for explanation. Stick to the absolutely essential facts. Let the jury see that the witness is more interested in advocacy

than the truth-seeking process of answering questions. Find a strong point (with strong impeachment) to get the witness off-stage as quickly as possible.

H. Physical Embarrassment

Imagine the following scenarios: Knocking over the bailiff's plant with a blow up; Holding the top of a tripod while the legs fall off and bounce on the floor; Waiving a note pad at documents carefully laid on the jury box and blowing them into the air; Knocking a note pad from the railing down to an unretrievable position in the witness box; Sitting on a styrofoam cup of water on counsel table at the climatic moment of closing argument.

I've done all these things and more at trial. There is only one remedy: Laugh at yourself with the jury, then shake it off and move on.

I. Trial Amendment

Rule 66, Tex. R. Civ. P., permits a trial amendment under certain circumstances. If a party objects that the other side's evidence is outside the pleadings, or there are pleadings defects or omissions, the court may allow an amendment. It should "do so freely when the presentation of the merits of the case will be subserved thereby." Id.

The burden is on the party objecting to the amendment to show surprise or prejudice. If the party requesting the amendment is attempting to assert a new cause of action, a mere objection may be sufficient to meet the burden. Hardin v. Hardin 597 SW 2d 347 (Tex 1980); Greenhalgh v. Service Lloyds Insurance Company 787 SW 2d 938 (Tex.1990). The court may allow a postponement so that the objecting party can meet the additional evidence.

J. Mistrial

If the surprise cannot be remedied by an objection, motion to strike, and instruction to disregard, consider whether to seek a mistrial. Never move for mistrial merely for dramatic effect. Don't ask for it unless you truly want it. If you don't want it, and your motion is granted, you will have a lot of explaining to do.

I have never sought a mistrial. But if I did, I would certainly approach the bench and make the motion inaudible to the jury.

IV. CONCLUSION

In a campy 1960s movie, the crew of a spaceship is completely surrounded by deadly, rapidly multiplying, green slime. The Captain tells his crew: “Whatever happens, keep everything under control!”

I realize that the above instructions may sound about as useful as the movie line, but if you are able to keep your composure no matter what happens at trial, you will have gone a long way toward winning your case. Like other forms of theater, imagery is critical. Part of that imagery, whether positive or negative, stems from the jury’s perception of how you and your client deal with difficult situations - such as trial surprises.

Section 2

EIGHT KEYS TO THE ART OF PERSUASION

Judge Mark Drummond
Associate Circuit Court Judge
Qunicy, Illinois

Drummond, Mark A., *Eight Keys to the Art of Persuasion*, (NITA 1999).
ISBN 1-55681-669-3

EIGHT KEYS TO THE ART OF PERSUASION

*Advocacy **is** the **art** of persuasion*
Foreword to "The Technique of Advocacy"
by John Munkman

I have rejected the title "The Art of Advocacy"
Introduction to "The Technique of Persuasion"
by Sir David Napley

Welcome to the *Eight Keys to the Art of Persuasion*.

Who am I and why spend a day with me?

For almost twenty years I have been a trial lawyer. Fortunately I have been blessed with many cases that were actually tried to verdict. For many years, after each jury returned a verdict, I sent out a juror feedback questionnaire. This presentation is an accumulation of ideas from four sources:

1. My own experiences in trying both jury and bench cases to verdict.

2. The feedback questionnaires from both jurors and judges.

3. The feedback questionnaires from my consulting clients - the other attorneys I work with to prepare them and their cases for trial and for persuading the other side to settle.

4. My teaching with the National Institute for Trial Advocacy.

In 1985 I took the NITA course in Boulder, Colorado as a student. It was three weeks of learning by doing -trying a skill, listening to a constructive critique in front of my peers and then sitting in a room one on one with a NITA faculty member. It was the best learning and professional experience of my life. My team leader in Boulder was David M. Malone.

The next year Dave asked me to be his assistant and from 1986 on I have been a NITA instructor in addition to being a trial lawyer. Over the years I have learned from each and every participant and NITA instructor I observed. This presentation contains many of the techniques I have gleaned from them over the thirteen years I have taught for NITA. This presentation is dedicated to David M. Malone and to David, Alexander and Jane, who have carried on when Dad was away at trial.

PRIMACY
FIRST IMPRESSIONS ARE GOLDEN

ò Your first few words are like nuggets of gold. It is the only time you are guaranteed 100% of the attention of the judge, jury, opposing counsel or client.

ò First impressions are made within **seconds**!

ò Look for opportunities to make first impressions **before** the trial
- settlement negotiations, depositions, mediations, etc.

A. Opportunities for first impressions at trial

1. Your arrival at the courthouse. Your jurors are watching you! I can't count the amount of times I have heard attorneys talking in the hallway or elevator about the great putt one of them made at the country club

2. Thoughts on creating a good first impression during jury selection

a. Check clerk's office for questionnaire

b. Get list before trial to learn names

c. Get name correct immediately

d. Remember equality in questions, or "why didn't he ask me that?"

e. Corralling the "rogue juror"-the other jurors will thank you

f. Getting rid of the "rogue juror" by consent

g. The risk of overselling

h. "We excuse Mr. _____ with our thanks"

i. The best way to excuse-let the judge do it

j. Stereotypes
k. The "first twelve honest people not directly related to the party" theory

l. Organization

m. Conspiring with your client

n. The embarrassing stuff-let's go into chambers

o. The "extreme question" and its use

p. Raising your hand and other things we have not done since third grade

3. Thoughts on creating a good first impression with the judge

a. Know your judge

b. Know the judge's procedure on:

i. Jury selection

ii. Exhibits

iii. Jury instructions

iv. Use of exhibits on opening

v. Speaking objections

c. Know the courtroom

i. Electrical plugs

ii. Overhead projectors (spare bulb) and VCR

iii. Sightlines

iv. Chalkboards and easels

v. Acoustics

d. Know and respect the courtroom personnel

i. They will help you

ii. They talk

iii. They talk to the judge

iv. YOU get the water

e. USE THE TRIAL NOTEBOOK

f. Have memorandums of law prepared

g. Go over scheduling difficulties

h. Have a statement of the case ready

i. Continuing objections

j. Know how to handle "stupid" questions

B. Creating a good first impression with your opening statement

1. The usual beginnings that do not work

2. Why we do it

3. "What I say is not evidence" and "you will hear" . . . just tell us

4. Don't argue-it is a rule of the court and persuasion

5. Ownership of ideas

6. Bulletproof your opening

7. If you make a mistake-anytime

8. Begin with a theme

a. Actions speak louder than words

b. Haste makes waste

c. The blind leading the blind

d. A fool and his money are soon parted

e. The bluntly stated theme repeated ("He promised")

f. Childhood sayings ("Look both ways before you cross")

g. The "intersecting lines" theme

h. The "time line" theme

i. The "great quote" theme

j. The rhyme

k. The pun

l. The song-at least the title if you can't sing

m. The movies

i. *The Longest Day* ("For him every day is the longest day and let me tell you why. . .")

ii. *The Wizard of Oz* ("Pay no attention to . . .")

n. Books ("It was the best of times, it was the worst of times")

o. Go to the library

p. TV

q. A child

C. Creating a good first impression with direct examination

1. Times to begin with impact

2. Times to begin with background

3. The jury pays as much attention as you do

4. The "mirror image" rule

5. The eyes have it

6. Where to stand

7. What to ask-who, what, where, when, why, how, describe, explain

8. Why we don't lead

9. Headlines

10. Rehearsals

11. Demonstrations

12. Refreshing recollection

13. Objections

14. Taking breaks-beat them to the punch

15. Special rules for experts-the formula

a. Intro

b. Teaser

c. Qualifications

d. Tender

e. Sources of information

f. Opinion-out first or do you build to it?

g. Basis

h. Where do you differ from other experts?

i. Why, and why are you right

D. Creating a good first impression with cross-examination

1. The old saw-get the good stuff first

2. Honey gets more flies than vinegar

3. Don't let them repeat direct

4. The "ricochet" theory

5. Headline

6. Get rid of intros and tag lines-remember tennis ball

7. Why we do it-to think, and no requirement of question within seconds

8. The one fact-leading question-the Cadillac of questions

9. Why can't they answer the question?

10. Facts, not conclusions, unless you can impeach

11. Don't throw rabbits on the path

12. The "dilution of impact" theory

13. Know your safety nets and how to get to them:

a. Prior testimony

b. Deposition

c. Prior statement

d. Another witness

e. General propositions everyone agrees with

f. Self-evident characteristics

14. Witness control devices

a. Repeat the question

b. So, the answer to my question is. . . .

c. So, the short answer is. . . .

d. That's not my question, my question is. . . .

e. Yes or no. Just yes or no

f. Move to strike as non-responsive

g. You are answering more than I'm asking

h. Are you done?

i. To put it in your words

j. There you go again

k. Do you think this is funny?

l. Are you sensitive about that?

m. I have not asked that very well

n. Let's try this again

o. We'll get to that . . . then never do

p. Hold up your hand

q. Write it on the board-peers and experts only

15. The RED cover

16. Begin strong and have a bailout

17. "SOMEBODY STOP ME!!"

18. When they throw you a diamond

19. The Shakespeare cross-fit the cross to the witness, the witness to the cross

20. Impeachment-take the jury to the mountains

21. Humor

22. Don't end with Otis

23. The question you don't care about

24. Beethoven's Fifth-short, short, short, long ("Would you tell? . . .)

25. Special rules for experts

a. The island of expert opinion-a very dangerous island!

b. The island of everything else

i. Things not done

ii. Qualifications

iii. Bias

iv. Interest

v. Prejudice

vi. Things agreed with other experts

vii. General propositions

viii. Learned treatise

ix. Sources of information-are they biased?

x. Assumptions

E. Creating a good first impression on closing

1. How we start ("I would like to thank the Academy and my parents for. . . .")

2. Repeat theme

3. Themes that don't work

4. Give your fans what they need to convince the others

5. ARGUE! That's why you became a lawyer

6. Bury the thank you

7. Close the sale-tell them what you want

8. Rebuttal

9. Visuals

10. Your backdrop

11. Scrabble anyone?

12. The old saw-you can win on opening/lose on closing

13. The Bible

14. Rhetorical devices

i. Repetition

ii. Juxtaposition/antithesis

iii. Hyperbole

iv. Allusion

v. Alliteration

vi. Analogies

vii. Metaphors

viii. Rule of threes

ix. Simile

x. Rhetorical question

16. The instructions

17. Let time pass

18. Use the courtroom props

19. Humor

20. Tell 'em three times

21. If they seek legal counsel first . . .

22. The "baseball structure" to negligence cases

F. After you win

1. It's a small world

2. The walls have ears

3. What goes around, comes around

4. There is **always** a next time

5. Referrals-jerks don't get them

6. All glory is fleeting

7. Your win is best delivered from a mouth other than your own

8. NEVER tell anyone you settled under authority

9. There is **no** downside to being gracious in victory

G. On the rare occasion of a loss

1. See Rules 1 through 9 on winning

2. There's always the appeal

3. There's always a settlement if you haven't been a jerk

4. Remember, YOU cannot change the laws of nature or the FACTS

5. The true PROFESSIONAL is so refreshing

6. You learn more

7. You have already won. Do you realize what a tiny percentage of lawyers are willing to take a case clear to verdict? The world is full of poseurs, braggarts, and paper lions, but YOU have tried a case to verdict!

EMPHASIZE THE RECEIVER

A. The expert communicator concentrates totally on the receiver

B. The expert communicator appeals to all information processors

C. The expert communicator asks these questions:

1. What would I want to know, and in what order, if I had to decide this case?

2. How can I convey that information in the most understandable form?

3. How can I visualize my case through actual visuals or storytelling?

D. The three duties we owe:

1. Keep their attention

2. Make it understandable

3. Give them the arguments or write the judge's opinion

E. Concentrating on the receiver has two benefits; better communication and less nerves

REMEMBERED FACTS ALONE PERSUADE

A. The obvious-unless it is remembered in the jury room or chambers, it is worthless

B. Your case is not the only thing on the judge's/jury's mind

C. Remember the hierarchy of attention in a courtroom:

1. Actions

2. Objects

3. Pictures

4. Diagrams or charts

5. Written words

6. Spoken words

SIMPLIFY
DO A THOREAU

A. Theme

B. Your primary role in court-the advocate

1. Your second most important role in court-the teacher

2. On close calls they will go with the teacher-you put in the effort

C. The primary teaching methods:

1. Tell me and I will forget

2. Show me and I will remember for a while

3. Involve me and I will remember

4. Let me teach it to others and I will have it for a lifetime

D. The primary teaching tools:

1. Overheads (easy to see and flexible, colors, etc.)

2. Posterboard (Can you see it? Can you spell in the vertical plane?)

3. Uhu sticks + posterboard

4. PowerPoint (easy to see but have a backup)

5. The case in a nutshell

6. The time line

7. The highlighter

8. Diagrams of places or processes

9. Placards

10. Models (anatomical)

11. Demonstrations

UNDERSTAND THE POWER OF NOTEBOOKS

A. The trial notebook system. Four notebooks: for you, witness, opposing counsel, and judge, with overheads for jury (exhibits only) containing:

1. The case in a nutshell

2. The index

3. Combined request to admit facts and answer

4. Exhibits (pertinent portions highlighted; use colors)

5. Proposed judgment

B. Benefits

1. I am organized, clear, precise, and surgical

2. I don't want to do the exhibit dance unless. . .

3. I am going to make this easy for everyone

4. You can find my exhibits fast

5. You don't have to hunt for the good stuff-it is highlighted

6. I am not afraid of my opponent's exhibits

7. I have made the effort to make your job easier-reward me

C. Trial tools and some outlines

1. Jury selection

a. Jury graph

b. Names phonetically

c. Scoring system: +, ++, +++, and -, and 0, 00, 000

d. Score peremptories used

2. Opening and closing

a. Theme

b. Memorize first 90 seconds-Why?

c. Use stealth notes

d. Use visuals and exhibits-ask at pretrial conference

e. Chronology, reverse chronology, topical

f. Working without a net

g. Memorize ending

3. Direct

a. Impact question or background

b. Headline topic areas

c. Who, what, where, when, how, why, explain, describe

d. Mix the message; oral and visual

e. Avoid legalese

f. How to do it without notes

g. How not to lead

h. When to lead

i. The forgetful witness-refresh recollection, lead, take a break

4. Cross

a. Use ending words

b. Index safety nets

c. Headlines

d. Highlight impeachment

e. Have a valley of accrediting ready

ADDRESS
SEE GETTYSBURG

A. Less is more! Churchill and Lincoln

B. Number 1 juror complaint: attorneys are too repetitious

C. Number 1 juror complaint: attorneys are too repetitious

D. Number 1 juror complaint . . .see, it's even making you mad!

E. Average attention span-five to seven minutes

F. Can listen three to five times faster than speech, but only three different thoughts in a row rule

DELIVERY

A. When have you been at the height of your persuasive powers? Usually an emotional situation that you felt deeply about

B. Words are a small percentage of communication

C. Use the right words

D. Chunk

E. Remember what Arthur Schnabel said, "The notes I handle no better than many pianists . . . but the pauses between the notes . . . Ah, that is where the art resides"

F. You must believe unless your last name is Streep or De Niro

G. How to believe if you don't believe your client

EMPHYAS(EYES) AND VISUAL(EYES) STORY

A. We remember 80 to 90% of what we see and only 10 to 15% of what we hear.

B. Two ways-actual visuals or visualize in the mind

C. Storytelling exercise

D. Foreshadowing

E. Use of storytelling other than on opening

F. The "what didn't happen" approach

Section 3

Say Cheese!

The Pitfalls of Courtroom Graphics that are Deceptive, Misleading or Just Plain Wrong

Bryan G. Harston
Vice President
DecisionQuest, Inc.
Dallas, Texas

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1

Creating Demonstrative Evidence

- **What is the Nature of Demonstrative Evidence?**
  - **Based upon "real" evidence**
  - **Created after the fact; specifically for litigation**
  - **Designed by CREATIVE ARTISTS**
  - **Intended to be PERSUASIVE**
  - **Goal: exhibits that are prejudicial (but fair)**
- **Words can lie; So can pictures.**

2

Creating Demonstrative Evidence

- **So where does persuasion cross the line into deception?**
  - **Pictures exaggerate the numbers**
  - **Creative omission**
- **Counsel must identify misleading graphics from ALL SOURCES:**
  - **Opposing counsel and their witnesses (obvious)**
  - **One's OWN experts, designers (not-so-obvious)**
    - **Seemingly-innocent design choices can lead to inadvertent distortions of the overall picture**
    - **You or your witness could be hung out to dry ...**
- **The safe approach: Learn to SPOT and CHALLENGE deceptive graphics.**

3

Spotting Deceptive Graphics

- **Analyze every graphic before trial**
- **Two key questions:**
  - **1. Are the data accurate?**
    - **Verify numbers, totals, percentages, fractions. Duh.**
  - **2. Is the PICTURE accurate?**

4

Spotting Deceptive Graphics

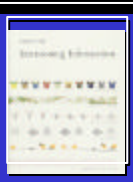
- **Favorite references:**

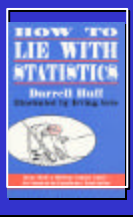
Tufte, Edward R.

- ***Envisioning Information*** **and** ***The Visual Display of Quantitative Information*** (et seq.)
  - **The "Lie Factor"**
  - **How the eye assists in understanding and retention**

Huff, Darrell (1954)

- ***How to Lie With Statistics***
  - **Numerical and visual tricks**
  - **How to read and evaluate statistical evidence**





5

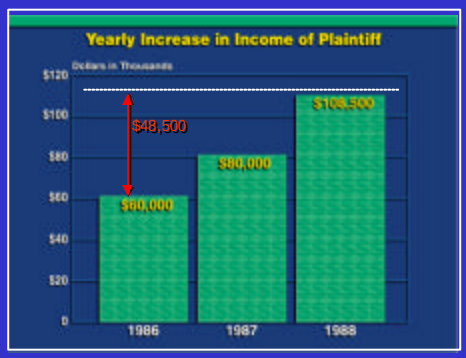
Tufte's "Lie Factor"

- *"The representation of numbers, as physically measured on the surface of the graphic itself, should be directly proportional to the numerical quantities represented."*
- **Translation: Use a ruler to actually measure the lines, the columns, the charts. If one *number* is twice as large as another, its *graphic* should be twice as tall as the other.**
- **Equation:**

$$\text{Lie Factor} = \frac{\text{Effect of Graphic (measured)}}{\text{Effect of Data (calculated)}}$$

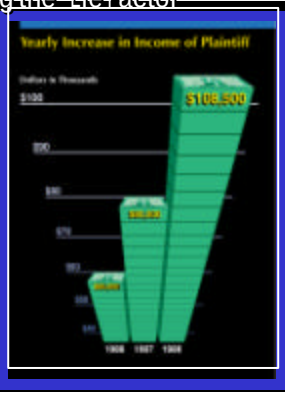
6

Calculating the "Lie Factor"



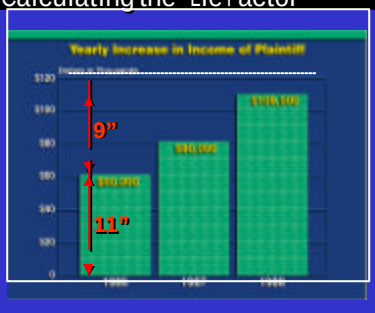
7

Calculating the "Lie Factor"



8

Calculating the "Lie Factor"



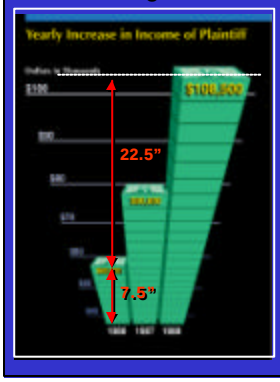
Effect of Graphic (measured)
9"/11" = 81%

Effect of Data (calculated)
$48.5k/$60k = 81%

$$\text{Lie Factor} = \frac{81\%}{81\%} = 1$$

9

Calculating the "Lie Factor"



Effect of Graphic (measured)
22.5"/7.5" = 300%

Effect of Data (calculated)
$48.5k/$60k = 81%

$$\text{Lie Factor} = \frac{300\%}{81\%} = 3.7$$

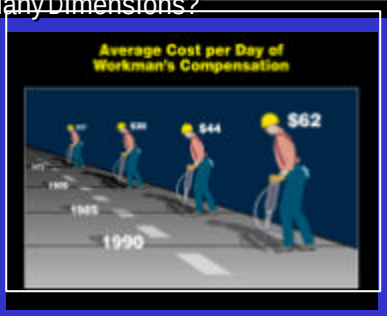
10

How Many Dimensions?

- Data "dimensions": How many variables?
  - Unit price of something = 1 dimension
  - Unit price over time = 2 dimensions
  - Unit price over time for several different products = 3 dimensions
- Graphic Dimensions
  - How many axes does the graphic itself have?
  - If data is 2-D, is graphic 3-D? If so, why?

11

How Many Dimensions?



Two data variables (Daily cost, Years) = 2-D data

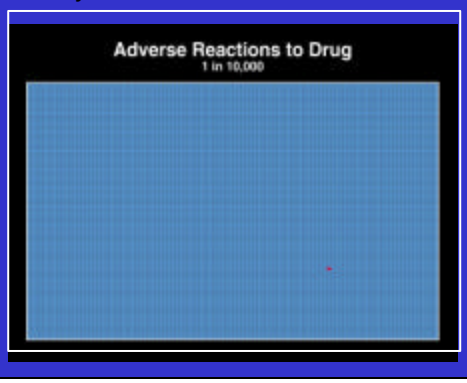
Use of perspective (3-D graphic) distorts change.

12

How Many Dimensions?

13

How Many Dimensions?



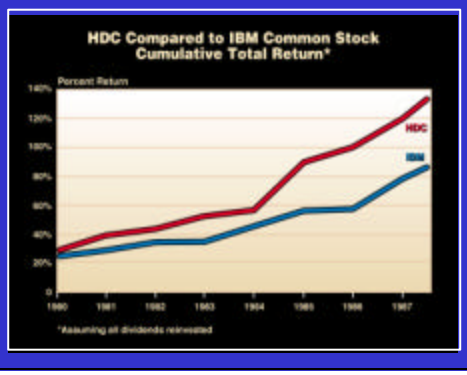
14

Horizontal or Vertical?

- Graphic formats (screen and print) are roughly 3 x 4
- One longer side, one shorter
- Use of vertical axis can compress one scale or exaggerate the other

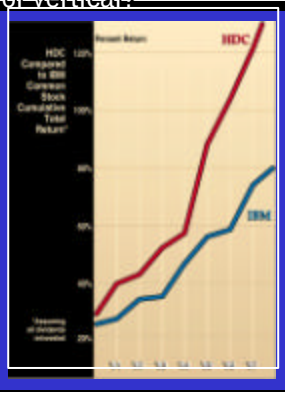
15

Horizontal or Vertical?



16

Horizontal or Vertical?



17

When We Return …

- **Money Matters**
- **The Oldest Tricks in the Book**
- **Manipulating "Averages"**
- **Other Media**
  - **Photos**
  - **Video**
  - **Animation**

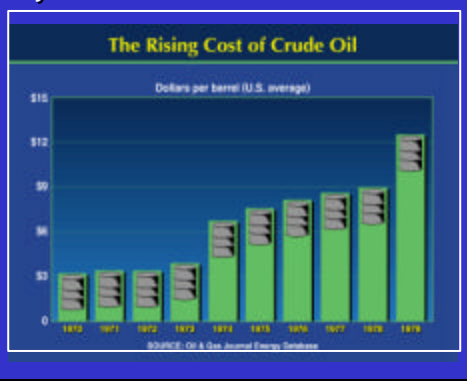
18

Money Matters

- The value of money changes over time.
  - If you didn't know this, sign up for an introductory accounting class at a community college. This is important.
- Graphics should adjust numbers for inflation, OR state that they are NOT adjusted
- Inflation corrections should be noted clearly on any graphic that includes such correction.

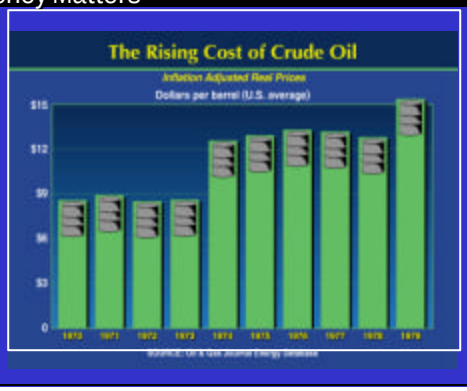
19

Money Matters



20

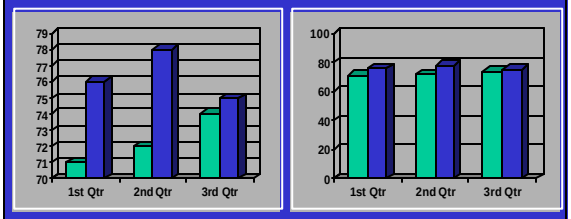
Money Matters



21

Oldest Tricks in the Book(s)

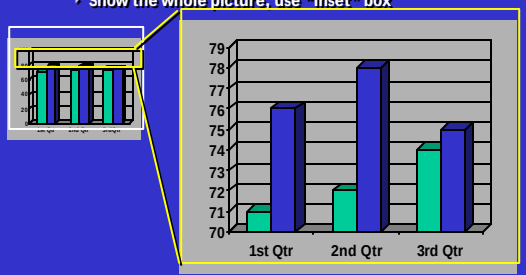
- **No "zero" on the vertical scale**
  - Look at the data range; min and max



22

Oldest Tricks in the Book(s)

- **A better way:**
  - Show the whole picture, use "inset" box



23

Oldest Tricks in the Book(s)

- Data designs
  - Ours: Green lines and smiley faces
  - Theirs: Red lines, skull/crossbones
- How was the SAMPLE chosen?
  - How many requests?
  - How many responded?
  - How trustworthy are the responses?
  - What is the MARGIN OF ERROR?
- Watch out for "Averages"
  - Mean, Median, or Mode?

24

Mean, Median, Mode

- **Mean (a/k/a "Arithmetic Mean")**
  - Add all the values, divide by the quantity
  - What most people think of as "average"
- **Median**
  - The MIDDLE number in the sample, regardless of value
- **Mode**
  - The value in the sample that occurs MOST FREQUENTLY

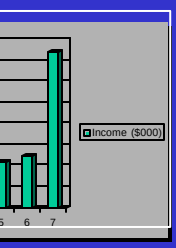
25

Mean, Median, Mode: EXAMPLES

"AVERAGE" Annual Income

(Sample: 7 Workers)

1. $ 35,000
2. $ 35,000
3. $ 35,000
4. $ 41,500
5. $ 44,000
6. $ 50,000
7. $150,000



26

Mean, Median, Mode: EXAMPLES

"MEAN" Income

1. $ 35,000
2. $ 35,000
3. $ 35,000
4. $ 41,500
5. $ 44,000
6. $ 50,000
7. $150,000

$$\text{MEAN} = \frac{\text{Total}}{\text{Quantity}} = \frac{\$390,500}{7}$$

Average Income (Mean) = $55,785

27

Mean, Median, Mode: EXAMPLES

"MEDIAN" Income

1. $ 35,000
2. $ 35,000
3. $ 35,000
4. $ 41,500
5. $ 44,000
6. $ 50,000
7. $150,000

MEDIAN = Middle (4th) value in the sample

Average Income (Median) = $41,500

28

Mean, Median, Mode: EXAMPLES

"MODE" Income

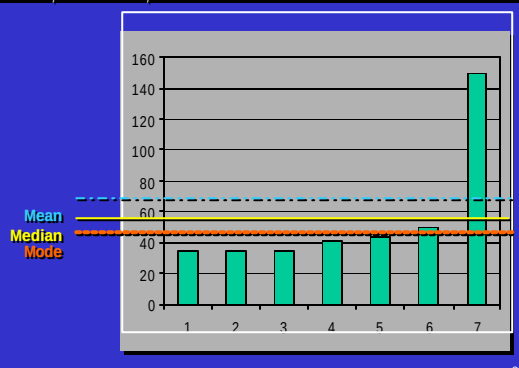
1. $ 35,000
2. $ 35,000
3. $ 35,000
4. $ 41,500
5. $ 44,000
6. $ 50,000
7. $150,000

MODE = Value that occurs most frequently in the sample

Average Income (Mode) = $35,000

29

Mean, Median, Mode: EXAMPLES



30

OTHER MEDIA: What to Watch For

- **Photos**
  - **Alteration, image manipulation**
  - **Request copies of negatives**
  - **Look for "lab" info on back of prints (batch/lot numbers, location I.D.)**
  - **Camera angle (cropping)**
  - **Lens selection (can artificially compress or expand distances)**

31

OTHER MEDIA: What to Watch For

- **Camera Angle (cropping)**

Selective Cropping

The Whole Picture

32

OTHER MEDIA: What to Watch For

- **Camera lens selection (long v. short)**

Long (telephoto) Lens
* Foreshortens apparent depth
* Crops out background info

Short (wide-angle) Lens
* Emphasizes depth
* Includes more background

33

OTHER MEDIA: What to Watch For

- **Videos**
  - Always ask for dubs of original videotapes
  - Get an affidavit of videographer
    - "True and accurate copies"
    - "Soundtrack, if any, unaltered"
    - IF DEPOSED: "Did you erase or delete any video at time recording was made?"

34

3D Animation, Scale Models

- Accuracy
  - Source of data used by modeler
  - Degree of accuracy sought (to the mile, to the foot, to the inch, to the micron ...)
- Model detail
  - Decision not to use FULL detail (focus only on key items)
- Motion
  - Mechanical: Very easy to duplicate
  - "Organic" (natural) movement is extremely difficult (Humans, animals, water, smoke, gases, wind, wave motion, etc.)
  - Inquire as to source of motion data

35

Conclusion

- Graphic arts provide opportunity to be CREATIVE
- Be a zealous advocate, but exaggerate or distort at your peril
- Watch for exaggeration/distortion in materials proffered by opponents
- Don't just believe your eyes:

  CHALLENGE WHAT YOU SEE

36

NITA

Appendix A

"Cardinal Rule Number Eight: The Importance of Using Language Precisely and Persuasively"

Hon. Douglas S. Lavine
Cardinal Rules of Advocacy

Chapter Eight

CARDINAL RULE NUMBER EIGHT: THE IMPORTANCE OF USING LANGUAGE *PRECISELY AND PERSUASIVELY*

> *The difference between the right word and almost the right word is the difference between lightning and a lightning bug.*
>
> —Mark Twain

A. The Primary Importance of Words in Advocacy.

What the brush is to the painter, what the scalpel is to the surgeon, the *word* is to the advocate. It is the primary tool of the lawyer engaged in persuasion. The casual and imprecise use of words—the failure to appreciate the significance of language and to use it to its full effect—is a critical failing of advocacy. Words have *power.* How much power depends on the skill with which they are used.

If you take nothing else away from this chapter—or even this entire book—I hope you will always remember this: *every time you rise to speak in a legal setting, or submit a written product, you are putting into play your most essential tool—the power of words—and you must proceed with the utmost thought and precision.* That is the gist of this entire chapter; all the rest is commentary. The precise and persuasive use of language is a cardinal theme of all good advocacy.

This topic is massive. While preparing this chapter, I logged onto Amazon.com's section for books and typed in a few search terms. The word "word" brought up 8,106 matches. The word "language" brought up 32,000 total matches. "Writing" called up 18,010 matches, and "linguistics" called forth 12,411 matches.

I have a confession to make: I have not read all of those books. I will leave it to the linguists, etymologists, and philosophers to delve into the deeper importance of language and the way we process reality. I intend to tackle more mundane topics, and will limit myself to five discrete themes that

I believe are of paramount importance to effective advocacy. First is the threshold task of emphasizing the primary importance of reframing our relationship with words to recognize their overarching importance to advocacy. Second is the need to understand the special demands that legal language—a particular lexicon we lawyers must use—places upon those engaged in advocacy. Third will be an examination of some of the differences between the persuasive, and unpersuasive, use of words. Next will be an analysis of the need to speak and write with clarity and precision. Finally, the chapter will end with a discussion of the need to plan, revise, rewrite, and rehearse.

B. Reframing Our Relationship with Words.

My first objective—something I have begun above—is to persuade you to do some reframing of how you view your relationship with words. Now I am being a bit presumptuous when I assume that you need to "reframe"—and I use that word intentionally—your relationship with words. But if you are anything like I was until I hit thirty-five, you probably have had a relatively casual relationship with words. Let me explain. I enjoyed using words and language, writing and reading, but I failed to fully appreciate the critical relationship between effective use of words and persuasive advocacy. I tended to take it for granted that at the right time, the approximately correct words would tumble out of my mouth—or appear on the page—and all would be well.

Somewhere along the way, I realized that it was time to get serious about the tools of my trade. My goal is to get you to start thinking about how you think about words and to develop a new respect for words—even if you think you already respect them enough. My objective is to get you to stop and think about why words are so critical to the advocate's task; whether you appreciate their full power; and how you can use words more purposefully and effectively to persuade. As Jacques Barzun has written: "The price of learning to use words is the development of an acute self-consciousness . . . You must attend to words when you

read, when you speak, when others speak. Words become ever present in your waking life, an incessant concern, like color and design if the graphic arts matter to you, or pitch and rhythm if it is music, or speed and form if it is athletics."

The importance of using language carefully may seem self-evident to you. But in an age when most people get their news from television, when modern technologies and communication have changed the speed with which we receive information, and in which computer generated images adorn most movies in one way or another, the importance of words can get overlooked.

I can assure you that the sloppy and thoughtless use of words is a problem in the legal profession, just as it is in society at large.

C. Legal Language Has Special Attributes.

The advocate who wishes to use words effectively immediately confronts a conundrum. He must accept the reality that language—even legal language—is almost never as precise as he wants it to be, and that the meaning of words depends on context. He must also acknowledge the ever-changing meaning of words and the inherent limits of words to communicate ideas. Quite a fix to be in, in a profession that purports to prize predictability, precedent, and precision.

Moreover, he must accomplish the advocate's balancing act in a profession that has developed a nomenclature very much its own. Legal language has special attributes, some of which have subjected it to ridicule throughout the centuries. It is the job of the effective advocate to master the use of legal language, using legal terms to express legal concepts when necessary. But it is also the job of the effective advocate to avoid allowing his use of legal language to become a caricature. Resort to long-winded phrases and complex formulations, if reflexive, is not only farcical—it is bad advocacy. The advocate must be "bilingual," seamlessly moving back and forth between "legal" language and "normal"

language, depending on his audience and circumstances. In all events, the effective advocate should always avoid the worst tendencies of legal speaking and writing—the kind of pompous, overblown, pretentious rhetoric that has understandably made lawyers the targets of satirists. This is the kind of language that prompted Professor Fred Rodell of Yale to once remark that there were only two things wrong with legal writing—its style and its content.

In *The Language of the Law*, David Melinkoff lists some of the special attributes of legal language. His list includes the following:

a. "Frequent use of common words with uncommon meanings." Use of words like "action," which means one thing in common parlance, and refers to a lawsuit when used in a legal context.

b. "Frequent use of Old and Middle English words once in use but now rare." Words like "aforesaid," "forthwith," and "witneseth."

c. "Frequent use of Latin words and phrases" such as "ab initio," "ex parte," and "in rem."

d. "Use of French words not in the general vocabulary." Melinkoff's examples include "guardian," "infant," and "lien."

e. "The use of terms of art." These are technical words with specific meanings. Examples include "amicus curiae," "lessee," and "garnishment."

f. "Use of argot." Melinkoff describes argot as "cant," "jargon," and "slang," and defines it as a "specialized vocabulary common to any group." When a lawyer says "Move to strike" after a witness has answered a question, that is using argot, insider's language that may not be understandable to persons outside the group.

g. "Frequent use of formal words." These, notes Melinkoff, are often found in pleadings and contracts. Examples include "Comes now the plaintiff," or "Know all men by these presents . . . "

h. "Deliberate use of words and expressions with flexible meanings." These are legal words that are intentionally pliant. They include terms such as "due care," "clearly and convincingly," and "it would seem."

i. "Attempts at extreme precision." This involves terms such as "all," "none," "perpetuity," "never," and "unavoidable."

Melinkoff also enumerates what he calls "mannerisms" of the law, including wordiness, lack of clarity, pomposity, and dullness.

Lawyers are thus left with the following recurring dilemmas. They are supposed to use language that is "precise," while understanding at the same time that precision has its limits. They are supposed to explain complex legal concepts to laypeople while avoiding the use of stultifying legal terminology. And they are required to make legal arguments to judges and panels of judges and other lawyers without habitually slipping into the kind of soporific legalisms that will put judges, as well as laypeople, to sleep.

What is the advocate to do? I have a few suggestions.

First, as Jacques Barzun suggests, it is necessary to develop a heightened awareness about how one is using language and how others use it. A certain self-consciousness is required. As noted previously, I once was informed that Arthur Liman, an outstanding New York trial lawyer, used to read the *New York Daily News* every day so he could stay in touch with the language used by lay people. There is no substitute for reading and listening carefully to how others use language when speaking and writing. It is particularly important to avoid falling into the habit of resorting to legalistic language when everyday speech will do. When you hear yourself tell your kids that their request for some new toys

are "irrelevant and immaterial," hopefully some internal red flag will tell you that you need to take a few deep breaths and relax.

Second, it is important to develop the consciousness of the skilled interpreter. Have you ever watched a good translator at work in a courtroom? He moves back and forth between languages, speaking to both audiences with the same effortlessness. The advocate must develop a similar ability to "translate" complex legal concepts into simple language. He must learn to run a dual dialogue in his mind, and switch back and forth between them, depending on his audience and objectives.

Next, it is important to remember the lesson of chapter 1. The advocate must always keep in mind the characteristics of his audience. The use of complex legal terminology may be appropriate—even required—when arguing a patent appeal to a panel of judges. But if the same issues are being aired to a jury of laypeople, the advocate must come up with ways to translate complex issues into comprehensible words.

D. Attributes of Persuasive, Understandable Speech.

In the last century, a number of theories have developed as to how we can best promote change in others. These theories are complex, and in varying degrees are based on inconclusive and disputed findings. A brief summary of one of these leading theories is instructive as a prelude to a discussion of the attributes of persuasive speech.

The Yale Attitude Change approach was pioneered by Carl Hovland, a psychology professor who headed a team of researchers seeking to influence the morale of World War II soldiers and to change civilian attitudes toward the war effort. This approach spotlights four processes which influence attitudes (defined as the emotional response people have toward an object), and the beliefs (defined as the cognitive or knowledge component) underlying the attitudes. First, the Yale approach stresses the importance of gaining a

person's attention. Second, it highlights the need to ensure that the person understands the message. Next, it underscores the importance of gaining acceptance through offering "rewards" in the message. Finally, the message must be retained by the audience—it must have staying power.

To rely on any "theory" which attempts to explain why humans behave as they do is unhelpful. Human behavior is too complex, and too mysterious, to be reduced to pat precepts and simple formulae. But it seems to me beyond dispute that persuasive speech has certain attributes that unpersuasive speech lacks. Whether one adopts the Yale Attitude Change paradigm—or just relies on one's own intuition and experience—it is useful to study what sort of language is most likely to grab an audience's attention; make an argument comprehensible; and leave the argument burning in the audience's mind.

Words are commonly used to convey information; to create a mood or feeling, as poetry and music does; or to change a person's thinking and actions. The kinds of words we use depend on whether we are simply trying to convey information; or persuade and motivate. Regardless of whether our goal is to convey information, or to persuade—again, always taking the particular audience's profile into account—certain sorts of words are more likely to be helpful.

How does persuasive speech differ from speech that is not persuasive? Books have been written on this subject and careers have been devoted to studying this question. Rather than try to make any simplistic generalizations about what constitutes persuasive speech, I would rather simply list some of the attributes of persuasive speech—and unpersuasive speech—as set out on the following chart.

Persuasive Speech	Unpersuasive Speech
1. Builds bridges to audience	1. Erects barriers to audience
2. Short and to the point	2. Long-winded
3. Simple	3. Complex
4. In plain English	4. Legalistic and jargon-filled
5. Concrete	5. Abstract
6. Active, vivid, alive	6. Passive, tiresome, stultifying
7. Direct	7. Indirect
8. Honest, authentic	8. Deceitful, contrived
9. Interesting and engaging	9. Boring
10. Creative	10. Cliche-ridden
11. Evocative	11. Dulls the senses
12. Tailored to particular audience	12. One size fits all
13. Precise	13. Uses "weasel" words
14. Powerful	14. Powerless
15. Promotes self-induced change	15. Heavy-handed and coercive
16. Unpretentious	16. Arrogant and self-important
17. Appropriately uses humor	17. Humorless
18. Unambiguous	18. Vague
19. Original	19. Trite
20. Uses colorful verbs	20. Little or no use of colorful verbs
21. Infrequent use of adjectives	21. Overuses adjectives
22. Conjures up vivid visual images	22. Conjures up nothing

E. Techniques for Bridging the Gap between Legal Language and the Audience.

Let's focus next on the formidable task facing the forensic advocate. Encumbered by rules of evidence, he must recreate in a staid courtroom setting highly emotional and complicated events that occurred weeks, months, or years ago. He must do this primarily through the use of words.

The good advocate must therefore learn to use words to evoke more than just words in his audience. He must use words to gain entry into the audience's mind, heart, and imagination.

To do this, the advocate must heighten his own imaginative sense and call on his audience to use its imaginative powers to the fullest extent possible. The great advocates of history—in and out of law—have used the enormous power of imagination and imagery to breathe life into dead events.

1. Visual Imagery.

Great advocates use vivid language to paint unforgettable word pictures. Let's look at some shining examples. You may want to read them out loud to absorb their full impact.

Cicero painted vivid word pictures throughout his famous defense of Sextus Roscius of Ameria, falsely accused of murdering his father. His argument, referred to earlier in this book, is an astonishing tour de force using every available rhetorical technique to full effect. In his summation, Cicero stated this:

> It is because of the enormity of the crime of patricide that unless it is quite unmistakably proved people are unable to credit it. The charge can only carry conviction if the man's youthful life has been completely debauched, his character utterly corrupt and degraded, his way of living outrageously and scandalously extravagant, his capacity for violence unlimited, his wild behavior not far from insanity. What is more, he must surely have been the victim of his father's hatred, so that he now stands in fear of repression at his hands. He must have depraved friends, slaves who know about the whole business, a convenient opportunity, a suitable place for the deed. *I would go almost so far as to say that the judges must actually see his hands stained with blood before they can believe that so awful, monstrous and loathsome an action has really been committed.* [Emphasis added.]

Daniel Webster used words to paint a vivid picture as the prosecutor in a case involving the murder of an elderly man, Captain Joseph White. The language is archaic, but the word picture he painted is every bit as vivid as when Webster described the moments of the murder over 170 years ago:

> Deep sleep had fallen on the destined victim, and on all beneath his roof. A healthful old man, to whom sleep was sweet, the first sound slumbers of the night held in their soft but strong embrace. The assassin enters, through the window already prepared, into an unoccupied apartment. With noise-less foot he paces the lonely hall, half lighted by the moon; he winds up the ascent of the stairs, and reaches the door of the chamber. Of this, he moves the lock, by soft and continued pressure, till it turns on its hinges without noise; and he enters to behold his victim before him. *The room is uncommonly open to the admission of light. The face of the innocent sleeper is turned from the murderer, and the beams of the moon, resting on the grey locks of his aged temple, show him where to strike. The fatal blow is given!* [Emphasis added.] And the victim passes, without a struggle or a motion, from the repose of sleep to the repose of death!

Clarence Darrow, another of history's great advocates, uses his extraordinary forensic talent to paint a vivid word picture in his closing argument on behalf of Leopold and Loeb, who were facing the death penalty for the "thrill" killing of Bobby Franks, a teenager whose murdered body was found in a ditch. The issue was whether the killers would be sentenced to life in prison or sent to the gallows. Darrow might simply have argued that "It would be a terrible thing to put these two young men to death." But he was not the type of advocate to underutilize a moment so full of human and

dramatic potential. He created a gem for us to study through his use of elegant imagery and his impeccable sense of timing. Said Darrow, in one portion of his lengthy closing argument:

> My friend Savage [the prosecutor] pictured to you the putting of this dead boy in the culvert. Well, no one can minutely describe any killing and not make it shocking. It is shocking. It is shocking because we instinctively draw back from death. It is shocking whenever it is and however it is, and perhaps all death is equally shocking . . . It might shock the fine sensibilities of the state's counsel that this boy was put into a culvert and left after he was dead, but, Your Honor, I can think of a scene that makes this pale into insignificance. *I can think, and only think, Your Honor, of taking two boys, one eighteen and the other nineteen, irresponsible, weak, diseased, penning them in a cell, checking off the days and the hours and the minutes until they will be taken out and hanged . . . I can picture them, wakened in he gray light of morning, furnished a suit of clothes by the State, led to the scaffold, their feet tied, black caps drawn over their heads, stood on a trap door, the hangman pressing a string so that it gives way under them; I can see them fall through space—and—stopped by the rope around their necks.* [Emphasis added.]

What Cicero, Webster, and Darrow all do is use words and word images to mentally and emotionally transport the hearer from the dry courtroom into another time, another place, another frame of mind. When I read Cicero's words, I find myself leaning back and imagining a man with blood-stained hands, or clean ones. I find myself looking at my own hands. When I read Webster's words, I can just imagine the scene and practically see the victim's head, bathed in

moonlight, before he is struck down. Darrow's words transport me and force me to envision the horrible scene of a hanging as if it were happening before my very eyes.

Such creative use of words to conjure up images can be attempted by any lawyer in even mundane cases. I recall one trial in which the plaintiff alleged malpractice in connection with a hysterectomy. Much of the expert testimony concerned complex anatomical descriptions. But one of the lawyers, in questioning a medical witness, asked if the uterus could be described as a sort of inverted milk bottle. The witness said it could. From that point on, whenever the word "uterus" was used, it seemed that everyone in the courtroom was envisioning an inverted milk bottle.

2. Use of Metaphors and Analogies.

Two other devices the skilled advocate can use to break through to the listener are metaphors and analogies. A metaphor is a figure of speech in which a word denoting one object or idea is used in place of another to suggest a likeness between them, as in "the ship plowed the sea." Reasoning by analogy occurs when we compare one unknown facts or circumstances to a set of known, and familiar, facts and circumstances. What these devices permit the advocate to do is establish a frame of reference which the listener can relate to his own experience. That is why such devices are so powerful—they permit the advocate to relate to the listener *on the listener's own terms.* Have you ever been in a foreign country only to be confronted by someone who speaks your language? How reassuring that is. Advocates can learn from this common experience. Part of "knowing your audience" is speaking its language; this allows bonding to take place.

As mentioned earlier in this book, resort to analogies can be dangerous if strained or if the things being compared are so unalike that the comparison breaks down. But when arguing by analogy is successful, it has a persuasive force all its own. A superb example of skilled resort to analogy was used by Gerry Spence in the Karen Silkwood case. Spence

was arguing on behalf of the estate of Karen Silkwood, who had been killed by exposure to plutonium. The only defense available was that Silkwood herself had removed the plutonium from the nuclear power plant where it had been stored. Spence was faced with the task of explaining the legal concept of "strict liability" to the jury. Rather than rely on abstract legalistic formulations, here is what Spence said:

> You remember what I told you in the opening statement about strict liability? It came out of the Old English Common Law. Some guy brought an old lion on his grounds and put it in a cage—and lions are dangerous—and through no negligence of his own—through no fault of his own—the lion got away. Nobody knew how—like in this case, "nobody knew how." And, the lion went out and he ate up some people and they sued the man. And they said, you know "Pay. It was your lion and he got away." And the man says: "But I did everything in my power—I had a good cage—had a good lock on the door—I did everything that I could—I had security—I had trained people watching the lion and it wasn't my fault that he got away." Why should you punish him? They said: "We have to punish him—we have to punish you—you have to pay." You have to pay because it was your lion—unless the person who was hurt let the lion out himself. That's the only defense in this case: Unless in this case Karen Silkwood was the one who intentionally took the plutonium out, and "let the lion out," that is the only defense, and that is why we have heard so much about it.

The beauty of arguments like these is plain to see. They transform complex legal principles into everyday concepts

that jurors can understand. That is the source of their impact. Anything the advocate can do to make the unfamiliar *familiar* to his audience is bound to provide an enormous boost to effective persuasion.

Arguments rooted in metaphors also have this same effect. They take something uncommon and reduce it to something the jury can easily relate to. In *Metaphors We Live By* (The University of Chicago Press 1980), George Lakoff and Mark Johnson write that "*The essence of metaphor is understanding and experiencing one thing in terms of another.*" [Emphasis in original.] "Argument is War" and "Time is Money" are two simple examples they discuss and analyze. Lakoff and Johnson argue that human thought processes are largely metaphorical. If this is right, it helps explain the enormous persuasive power of metaphors.

F. Importance of Simplicity in Speaking and Writing.

Egged on by the popular culture's depiction of lawyers as aggressive blowhards, some lawyers have unfortunately developed a peculiar genius for mangling the English language. They use long words when short ones will do ("How did you extricate yourself from this predicament?" rather than "How did you get out of this mess?") They use complex sentences rather than simple ones "(Following the conversation you adverted to in your previous response, to what precise location did you and the defendant proceed?" rather than "Where did you and the defendant then go?") They use legal terminology rather than ordinary language ("Ladies and gentlemen, my client lacked the requisite mens rea in connection with the charges against her" rather than "My client didn't intend to hurt anyone.")

My own belief is that some lawyers speak this gobbledygook because they have developed the mistaken idea that lawyers are *supposed* to be hard to understand. Others probably imagine that the use of long words and Latin phrases makes them sound erudite.

Whatever the reason, years of watching lawyers at work in the courts—and of observing my own frequently verbose tendencies—have persuaded me that the advocate who abandons simple, direct ways of communicating is wasting one of his greatest potential assets. The most effective advocates are those who have mastered what Justice Robert Jackson called "the short Saxon word that pierces the mind like a spear and the simple figure that lights the understanding."

Whenever I feel a bout of long-windedness coming on, I turn to Lincoln for guidance. I keep by my desk a copy of the famous letter he wrote to Mrs. Bixby during the Civil War. It is a model of precise, elegant expression. Here it is:

> Executive Mansion
> Washington Nov. 21, 1864
>
> Dear Madam:
>
> I have been shown in the files of the war Department a statement of the Adjutant General of Massachusetts that you are the mother of five sons who have died gloriously on the field of battle.
>
> I feel how weak and fruitless must be any word of mine which should attempt to beguile you from the grief of a loss so overwhelming. But I cannot refrain from tendering to you the consolation that may be found in the thanks of the Republic they died to save.
>
> I pray that our Heavenly Father may assuage the anguish of your bereavement, and leave you only the cherished memory of the loved and lost, and the solemn pride that must be yours, to have laid so costly a sacrifice upon the altar of Freedom.
>
> Yours, very sincerely and respectfully,
> A. Lincoln

1. Clarity.

The great advocates throughout history have understood that unnecessary verbiage detracts from persuasiveness.

In his biography of John W. Davis, *Lawyer's Lawyer*, William Harbaugh describes the style sheet that Davis drew up for new lawyers at his firm. His 1953 revision dealt with a bar committee's recommendation to the attorney general.

The committee's impenetrable draft read as follows:

> To you, Sir, has been entrusted the enormous responsibility of recommending to the President the best qualified available persons to fill the vacancies on the United States Court of Appeals for the Second Circuit. Upon the wisdom of your recommendation depends the preservation of the prestige of this great Court and other courts to which you will recommend appointments in the future. We pray that in making your recommendations you will adhere to the fundamental principles outlined above, to the end that the Court in which we either for a long time have been privileged to sit or before which we have appeared as advocates these many years shall be the beneficiary of your best endeavors. May the banner of greatness of this Court never be hauled down!

Davis' revised draft states simply:

> We recognize the great responsibility you bear in making recommendations to the President for appointments to vacancies on the federal bench. Perhaps no function of your office has more lasting character. We do not doubt either your desire or your ability to perform this important duty to the best interests of the country that you serve. We offer these suggestions therefore with a sincere purpose to aid and support you in the carrying out of this great task.

There are a number of excellent books that provide detailed advice on how to improve legal writing. Let me try to summarize their key themes: (1) Be active, not passive; (2) Use the present tense where possible; (3) Focus on who did what and how they did it, *e.g.*, put actors in sentences and use subjects and interesting verbs; (4) Be wary of overusing adjectives; (5) Be simple, short, concrete, and precise; (6) Avoid lapsing into pretentious, legalistic formulations.

We sometimes think that the ancient orators prized complexity of language in their speeches. But even the most complicated thoughts can generally be expressed in simple language. Cicero warns us that "it is a major fault to depart from everyday language and the accepted usage of the community in general."

In writing and speaking, clear statements are the most persuasive—whether directed to a judge, who normally has a busy calendar and resents having his time wasted, or to a jury of laypeople, who do not want to be bombarded with legalistic rhetoric.

2. Precision.

Part of being economical in writing and speaking is being precise. Even as we acknowledge the inherent limits of language, we can still seek precision. Being precise does not mean that we are capable of using words to express a thought or idea with perfection. Being precise means saying exactly what we mean to say, not something close to it. Advocacy is not horseshoes; you don't get credit for almost saying what you intend to say. When we purge our language of fuzziness, it helps us to express our thoughts clearly.

G. Planning, Writing, Rewriting, and Rehearsing.

Some perfectionists may believe that they should be able to churn out a finished product of a written submission at the first sitting. Or that they should, the first time through, be able to spin out a flawless argument to a jury or court. This is highly unrealistic. First drafts are always rough around the

edges and can always be improved. Whether the task is to prepare a written submission, or ready yourself for oral advocacy, the process involves basically the same steps. The first step is to plan what you want to say. This is partly a mental process, and partly a matter of committing thoughts, ideas, and insights to paper. The second step is to write out what you want to say. If the final product is to be written, then this involves coming up with a coherent first draft. If the end product is to be oral, then this involves making notes, or an outline, from which you can speak. The next step is rewriting, which entails revising. This steps requires you to step away from the product, then enter into it again with new thoughts, improvements, and changes. Finally, for written products, there is the process of finishing the work. If oral advocacy is involved, this step requires rehearsal—an on-your-feet run-through of what you are going to say.

This process is just that—a process. It is almost impossible to compress these steps into one without losing a good deal of depth and flavor in what you ultimately produce. And these steps are required if you are to maximize your effective use of words and learn what language works—and what doesn't work.

It is said that Enrico Caruso strenuously rehearsed a part even if he had sung it many times before. Likewise, in advocacy, it takes a lot of hard work to produce beautiful music.

Notes

1. The quotations from Mark Twain and Jacques Barzun are found in *Advice to Writers*, compiled and edited by Jon Winokur (Vintage Books 2001), at pages 179 and 180, respectively.

2. S. I. Hayakawa writes of the "one word, one meaning" fallacy. Hayakawa states that modern linguistic thought is premised on the following premise: ". . . that no word ever has exactly the same meaning twice." (Emphasis in original.) *See Language in Thought and Action* (5th Edition Harcourt, Inc. 1990). Anyone who has ever engaged in the process of statutory construction knows that this is as true in the legal sphere as it is in everyday parlance because all language is contextual, that is, its precise meaning is determined by its context.

3. Melinkoff, *The Language of the Law* (Little, Brown and Company 1963). Melinkoff's entertaining book provides a thorough discussion of the distinguishing characteristics of legal language. His treatment of the characteristics of legal language is found in chapter 2. Mannerisms are discussed in chapter 3. In chapter 13, Melinkoff discusses the often failed attempts of lawyers to communicate with an extra dimension of precision.

Sometimes, the monstrosities produced by excessively legalistic writing and speaking are enough to make us laugh—or cry. In an earlier career as a legal reporter, I tried to satirize this tendency when I authored an article suggesting that lawyers might rewrite the opening lines of Genesis as follows:

> In, at around, and/or in close proximity to the beginning, God, in conjunction with his agents, assignees, and successors in interest created, devised, caused to be made, made, fashioned, formed, brought into being, conceived, invented and occasioned the Heaven and the Earth. And said Earth was voidable.

American Bar Association Journal, "At Issue," Volume 69, September, 1983, page 1192.

4. Lawrence M. Solan, a linguist and lawyer who wrote *The Language of Judges* has commented that "We are thus left with a body of writing that calls itself precise, but reserves the right to be as imprecise as it wishes when the situation calls for imprecision." *See* Solan, *The Language of Judges* (University of Chicago Press 1993) at page 120. Solan goes on at pages 120–21 to note that ". . . the peculiarities of legal language have become a symbol of the inaccessibility of the law to ordinary people and of the extraordinary expense of legal services. To many, I imagine, the lawyer is some sort of bizarre translating device . . . Some critics go so far as to claim that legal language is a plot perpetrated by lawyers to create the false impression that their services are needed so that the legal profession can fleece the rest of society."

5. Two other theories of persuasion are the Group Dynamics Approach, pioneered by Kurt Lewin of the University of Michigan, and the Cognitive Dissonance Theory, expounded by Leon Festinger in his book, *Theory of Cognitive Dissonance*. Lewin's theory views individuals not as isolated, passive receivers of information, but as social animals who are largely dependent on peers for information, and whose attitudes and beliefs are affected by the group. This theory postulates that the perception of a discrepancy that exists between an individual and his group can lead to opinion change. The Cognitive Dissonance Theory presumes that people will do what they can to eliminate or reduce discrepancies or inconsistencies that exist within them. Once a discrepancy arises, says the theory, an individual will alter an attitude to reduce the tension he is feeling.

6. Some years ago, researchers at Duke University's Law and Language Project set out to study a number of issues relating to the use of legal language. The book they produced examined the use of speech patterns in the courtroom, concluding that "form may at times be highly

significant, even to the point where a change in form can alter or reverse the impact of the message." *See* page 2, *Linguistic Evidence—Language, Power and Strategy in the Courtroom* (Academic Press 1982) by William O'Barr. This interesting book describes the work of the Law and Language Project. The study concluded, among other things, that subtle linguistic cues, including the use of what was characterized as "powerful" versus "powerless" speech can have a significant impact on the way the audience receives the message in the courtroom setting.

7. Of course, the advocate also has demonstrative evidence, including maps, models, charts, and documents to aid his persuasive task. But the focus of this chapter remains the advocate's primary tool—words.

8. Cicero's reference to "blood on the hands "argument is found in *Murder Trials* (Penguin Classics 190) at page 64. Webster's vivid closing argument in the prosecution of John F. Knapp, accused of killing Captain Joseph White, is found in Lagarias, *Effective Closing Argument* (The Michie Company 1989), at 177–78. Darrow's argument in the Leopold and Loeb case is found in *Attorney for the Damned* (Simon and Schuster 1957), edited by Arthur Weinberg, at pages 42–43. Spence's argument by analogy in the Silkwood case is found at page 443 of *Effective Closing Argument*.

9. The quote from Lakoff and Johnson is found in *Metaphors We Live By* at page 5. This book should be of interest to anyone interested in exploring the persuasive power of metaphors.

10. *See Lawyer's Lawyer* at page 259 for a discussion of Davis's writing exercise.

11. Cicero's admonition to use everyday language is found in "On the Orator I" in *On the Good Life* (Penguin Books 1971), at page 239.

12. It is not possible to say much meaningful about clear writing in a few sentences. Joseph M. Williams's *Lessons in Clarity and Grace*, Second Edition, (Scott, Foresman and Company, 1985), is an excellent treatment of this subject.

Strunk and White's *The Elements of Style*, a classic, is highly recommended.

13. For a humorous treatment of lawyers' verbose tendencies, *see* Beardsley, "Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles," *California Bar Journal* (March 1941).

The author concludes that lawyers should " . . . beware of, eschew, and sedulously avoid, all conglomerations of asinine affectations, flatulent garrulity, pompous prolixity, polysyllabic profundity and platitudinous ponderosity."

Musings and Exercises

1. Put this book down and ask yourself how precise and careful you are in your use of words in formal and informal situations.
   A. Now think of a person you have admired—a teacher, a minister or rabbi, or a friend—who you have found to be an effective communicator? How do they successfully use words to communicate with you? To convey information? To persuade you?
   B. Think of political leaders you have admired and whom you have found to be persuasive. Do they use words logically, concisely, and creatively? Do they use words to engage you, interest you, open you up to the point they were making? Are you generally able to understand the point they were making? Do their words elucidate—or obscure—the points they try to make?
   C. Irrespective of their forensic or linguistic abilities, do they come across to you as authentic? Credible? Why or why not?

2. Some people just seem to have a way with words. Can this skill be learned? What are some of the things that you can do to cultivate your relationship with words?

3. Is it realistic or helpful to plan out in advance what kinds of words you will use when making an argument in court? In a negotiation? Is this overprogramming yourself?

4. What are some of the special characteristics of "legal language," as opposed to language used in everyday speech?
   A. Do you agree that "legal language" tends to be complex and boring?
   B. Is it possible to discuss complicated ideas or concepts without using legal terminology that has

precise meanings? Isn't the use of legalistic terminology necessary when arguing to a judge or judges about complex legal concepts?

5. How can lawyers avoid using excessively legalistic language when arguing to laypeople?

6. What is it about metaphors and analogies that make them so useful in explaining complicated concepts to laypeople? Discuss three or four other techniques an advocate can use to "translate" legal principles into an understandable framework for laypeople.

7. Take a very persuasive speaker as an example.
   A. List the five attributes in this speaker's use of language that most directly contribute to his or her persuasiveness. *E.g.*, "The speaker is very concrete in his or her use of examples."
   B. Review the chart that compares "persuasive speech" with "unpersuasive speech." Do you agree with it? Take five attributes from each side and discuss how they contribute to persuasive or unpersuasive speech.

8. Now take someone whom you view as an unpersuasive, ineffective communicator. List five attributes that contribute to making him or her unpersuasive. *E.g.*, "The speaker uses long, boring sentences."

9. To what extent do variables such as tone, delivery, and pacing affect the way in which an oral advocate's words will be viewed as persuasive?

10. Studies have investigated the attributes of "powerful" versus "powerless" speech styles in courtroom settings.
    A. Do you think this distinction has validity?
    B. Write down two or three simple propositions, *e.g.*, "Free expression is essential to a democracy."

(1) Express these propositions using "powerful" words.
(2) Now express the same propositions using "powerless" words.
(3) Is the difference meaningful?

11. Do you agree that word choices that might be appropriate for oral advocacy might be inappropriate for a written submission? Why or why not? Can any broad conclusions be drawn about what sorts of words are more appropriate for oral, as opposed to written, advocacy?

12. This chapter argues that vivid visual images can be very helpful to effective advocacy.
    A. Do you agree?
    B. What is it about a visual image that assists the advocate in his attempt to persuade?

13. Take a look at the words used by Cicero in his argument on behalf of Sextus Roscius of Ameria.
    A. Discuss all of the less effective ways he could have gone about making the point he did.
    B. What is it about the language he used that makes it so vivid and image-filled?

14. Daniel Webster's summation in the case involving the murder of Captain White is a classic.
    A. Review it word by word, sentence by sentence. What are the factors that make it so effective?
    B. What are the word choices he uses that most contribute to the overall effect he is creating?

15. Clarence Darrow was one of the twentieth century's most celebrated advocates. His final argument on behalf of Leopold and Loeb, a small excerpt of which is provided in this chapter, is masterful. How does Darrow's

choice of words contribute to the overall effect he is creating?

16. Think of three common, everyday objects. Describe them in creative words that would not ordinarily occur to you.

17. Now think of three legal concepts (*e.g.*, "strict liability," "transferred intent," or "res ipsa loquitur.") Devise creative visual images, metaphors, and analogies that you could use to explain these concepts to a jury.

18. Why do you suppose some lawyers seem to enjoy saying simple things in the most complicated, legalistic way possible? How can you guard against slipping into that bad habit?

19. "If it is possible to cut a word out," George Orwell wrote, "always cut it out."
    A. Is this advice as true for lawyers as for writers?
    B. Is it as applicable to oral advocacy as written advocacy?

20. Go to the law library and copy an appellate brief. Or if you are feeling brave, find an example of your own written work.
    A. How could it have been shortened?
    B. Could the same ideas have been expressed in more compelling ways?

21. Take a page from this book. Go through it one line at a time. How could the writing have been improved upon to make it:
    (1) Shorter;
    (2) More precise;
    (3) Simpler.

22. Repeat the steps of number 21 above, using a written product you have authored.

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Appendix B

"Introduction"

"Reasoning and the Common-Law Tradition"

Ruggero J. Aldisert
Logic For Lawyers: A Guide to Clear Legal Thinking, Third Edition

Chapter 1

INTRODUCTION

From your first day in law school, that day of profound bewilderment, continuing through your career as a lawyer or judge, and I suppose, until the last day that you serve as a United States Supreme Court Justice, you are enveloped in that misty, murky phenomenon we call legal reasoning. Law students, at least most of those who graduate, learn this process—learn it, that is, with varying degrees of comprehension. It is taught through a ritual of fire, charitably called the Socratic method. Professor Kingsfield's line in The Paper Chase properly intimidates the first year law student on the first day: "You come here with your skull full of mush and our job is to make you think like a lawyer."

Some never master "thinking like a lawyer" even though they graduate, pass the bar exam and become financially successful attorneys. Even those who master the technique of legal reasoning are not always certain what it is. Certainly, they learn how to do it, some of it. They pick up the idiosyncratic signals of a given professor and learn his or her playbook. They learn how to go through the process, and occasionally, they learn why we do it. Often students, and unfortunately, lawyers and judges, do not know exactly what is being done. They learn the exercise. They go through the motions. But most are a little shy on theory.

I know this from much personal experience—over 35 years as a state trial and federal appellate judge, planning and teaching seminars for state and federal appellate courts, and 20 years as an adjunct law professor with administrative responsibilities at a prominent law school. Moreover, my views are shared by the few commentators who have written in this field. Professor Steven I. Burton observes that "it is remarkable how few books have been written to explain directly how lawyers reason. It is more remarkable how few such efforts are directed at beginning law students, who find it so frustrating to learn how to 'think like a lawyer.'"[1] Professor Jack L. Landau complains:

> The idea of teaching traditional logic to law students does not seem to be very popular. Not one current casebook on legal method, legal process or the like contains a chapter on logic. Only one text on legal writing, by Brand and White, contains even a list of common informal fallacies.[2]

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1. Steven I. Burton, An Introduction to Law and Legal Reasoning 1 (1985).
2. Jack L. Landau, Logic for Lawyers, 13 Pac. L. J. 59, 60 (1981) citing Brand & J. White, Legal Writing: The Strategy of Persuasion (1976).

This book is a modest attempt to fill that void. It is directed to "the what" of legal reasoning, or, if you will, legal logic, a term I use interchangeably with legal reasoning. Our purpose here is to explain, in very broad strokes, the basics of logic and its application to legal thinking, to describe the mental processes we utilize in "thinking like a lawyer." The purpose, quite frankly, is to get you thinking about thinking.

We have sought to illustrate the components of legal logic with excerpts from published judicial opinions. Alas, it is the happenstance that not many judges place a label on the particular element of logic involved. Too often, judges—like lawyers, law professors and law review writers—use the cop-out phrase "flawed reasoning." This trite phrase means nothing. It does not indicate whether the criticism relates to the choice of a controlling legal precept, its interpretation, its application of the facts or is a statement that a formal or material fallacy is present. I hope that in time this will change and also in time that briefs and opinions will be more specific.

This book is not an introduction to logical theory. Its scope is quite limited, for we discuss only a few concepts in the field of logic and we limit the discussion of them to those basics present in legal argument. The book defines and describes components of inductive reasoning, its main ramparts of specific instances—inductive generalization and the method of analogy. It will trace the role of these components in creating legal rules and transforming a series of rules into a broader legal precept, which we sometimes call a legal principle. The book will explain their relationship to the common law doctrine of precedent.

The book will describe deductive reasoning and how the selection of the major premise in the deductive syllogism is critical, whether that premise comes to us from a statute or is developed as judge-made law. It will outline the rules of the syllogism and describe what happens when they are breached, that is, when fallacies of form creep up on the best of us. But adherence to formalities is not enough. We must also learn how to avoid informal or material fallacies.

There is no academy award for knowing or adhering to formal or informal correctness. We all may reason well without knowing a single rule of the syllogism or, conversely, we may know all the details of logic and still be an inept lawyer or judge. The payoff in any given case is whether you win or lose. The payoff is not measured by style or grace as with a prima ballerina or a gold medal ice skater. Instead you get prizes for winning, like in the 100-yard dash or the quarter-mile or the marathon.

We are aware of the criticisms suggesting that logic has no place in legal reasoning because logic is concerned with form and not truth, and because the same set of facts may yield any number of perfectly logical conclusions. But these are only superficial observations. No one is suggesting that briefs can be written, arguments made and cases decided solely by reference to the canons of logic. Were this so, the legal profession would simply move to analysis by computer,

because the computer is the paradigm of formal logic. Value judgments reflecting the views of advocates and judges form the critical decisional points in the law. Rules of logic do not make these decisions; they are simply means to implement them. When these judgments are made, the formal reasoning process sets in to test the validity of the propositions constituting the argument. Criticisms of fealty to logical order "are not designed in large measure to remove logic from legal reasoning but to remove *bad* logic from legal reasoning."[3]

Our thesis is that we might all be better lawyers (and, of course, better students) if we understood the rules of logic instead of simply memorizing some of the steps. Judges, too, could judge more fairly, and therefore better, and publish more convincing opinions. It's great to play the piano without being able to read music, but unless you're an Irving Berlin, you're not going to reach your full potential by merely memorizing tunes that you've heard somewhere before.

A specific knowledge of the canons of reasoning enables one to discover more readily where the fallacy of a misleading argument lies. Without professing to guard us infallibly from error, the study of logic familiarizes us with the rules and canons to which correct reasoning processes must conform, and with the hidden fallacies and pitfalls to which such processes are commonly exposed. Among the obvious benefits to be derived from a careful study of logic is a facility in studying law, in detecting error in the reasoning process, in learning how to avoid errors and in thinking about difficult matters with clearness and consistency—a capacity much rarer, even among we members of the legal profession, than is commonly suspected.[4] The function of logical legal reasoning goes beyond the efficient application of legal precepts; it goes to the very formation of those precepts in the common-law tradition.

We all know "the why" of logic in the law. Justice Felix Frankfurter said it best on his retirement after twenty-three years on the Supreme Court: "Fragile as reason is and limited as law is as the expression of the institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, unprincipled, undisciplined feeling."[5]

We also know the test for a good legal argument or brief. It comes from what I call the Harry Jones/Roscoe Pound test for a "good" opinion: "[H]ow thoughtfully and disinterestedly the Court weighed the conflicting social interests involved in the case and how fair and durable its adjustment of the interest-conflicts promised to be."[6] You cannot advocate or pronounce a position that is "fair and durable" unless formal rules of logic go into the process. We cannot have decisions by judicial fiat alone. Nor, in our common-law system, can

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3. Jack L. Landau, Logic for Lawyers, 13 Pac. L. J. 59, 63 (1981).
4. }{\plain \i\f1 See}{\plain \f1 Comment, "Logic and Law," 3 Marq. L. Rev. 203, 204 (1919).
5. As quoted in Time Magazine, Sept. 7, 1962 at 15.
6. Harry W. Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1029 (1974).

we have court decisions like a double special super-saver airline ticket, good for passage on this flight on this date only.

What we propose in these pages is to describe the formal logic processes used in the common-law tradition. We will explain the difference between reasons and reasoning. We will identify the twin processes of inductive and deductive reasoning, and how they are used and sometimes abused. We will discuss logical forms. We will show how major premises in categorical syllogisms are identified or created either properly as universals or improperly as particulars; how this process becomes critical in solving problems; how fragile becomes the legitimacy of such premises when they are improperly fashioned by the fallacy of hasty generalization and the converse fallacy of accident; how major or minor premises sometimes become illicit; how in hypothetical propositions the conclusion sometimes becomes skewed by not properly affirming the antecedent and affirming the consequent instead; and how the end may sometimes be legitimate but the means, most tainted. We will draw upon many cases to demonstrate either fealty to, or disrespect of, logical form.

But form is only part of the problem. We will also take a look at those informal fallacies that somehow sneak up on us. Certainly, we will address the familiar non sequitur, post hoc ergo propter hoc and petitio principii (begging the question), but there are also other swamp lands into which we are tempted—hasty generalizations and faults in analogy where positive resemblances are not strong enough or negative resemblances are ignored.

We make no pretense that this book purports to be a comprehensive survey of logic, or even to provide a comprehensive introduction to the subject. Here you will find none of the "complicated symbolic perambulations"[7] so characteristic of the esoteric world of modern logicians. This book is merely a guide—a guide for students and practitioners of the law. It seeks to tread only limited terrain. It traverses only the high peaks of logical reasoning without endeavoring to describe the very slippery slopes of the peaks, or the valleys and crevices that form the wilderness of the logician's world. Only elementary concepts with illustrations from case law are necessary for our purposes.[8] The book touches only the surface of deduction and induction, of formal and informal (material) fallacies.

It does not purport to be a basic text on the introduction to logic, let alone a logician's treatise. Rather, it is a snapshot of the logic of the law taken by a student of the judicial process, with many years of experience on both sides of the bench

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7. Jack L. Landau, Logic for Lawyers, 13 Pac. L. J. 59, 61 (1981).

8. Much good writing in introductory logic exists in the literature. See, e.g., Joseph Gerard Brennan, A Handbook of Logic (1957); John C. Cooley, A Primer of Formal Logic (1942); Irving M. Copi & Carl Cohen, Introduction to Logic (9th ed. 1994); Irving M. Copi & Keith Burgess-Jackson, Informal Logic (1996); James Edwin Creighton, An Introductory Logic (1898); Ralph M. Eaton, General Logic, An Introductory Survey (1931); W. Stanley Jevons, Elementary Lessons in Logic: Deductive and Inductive (1965); R. McCall, Basic Logic (2d ed. 1952); William S. & Mabel Lewis Sahakian, Ideas of the Great Philosophers (1966); L.S. Stebbing, A Modern Introduction to Logic (6th ed. 1948).

and at the classroom lectern. My view is not intended to be comprehensive. It focuses only on certain features that may be helpful to those who study and practice law. Although much current teaching in logic classes is entirely too cumbersome for our purposes here, certain techniques—deduction, induction (with its concomitants, analogy and generalized induction) and avoidance of formal and material fallacies—can be explained without a prerequisite of having previously studied formal logic. These techniques directly bear on the legal reasoning process. As one experienced in teaching both students and newly commissioned appellate judges, I am convinced that these techniques can improve the quality of reasoning by developing important thinking skills.

A word of advice. Nomenclature used by logicians may be a little strange to those who have not studied logic. The reader who is new to logic should consider rereading the materials as often as is necessary. Although the text has been designed to be "reader-friendly," this is not the stuff of airport waiting room reading materials. Take your time in reading it, and always keep the book handy as a reference source.

But before entering upon the specifics of logic in the law, we must start with the rudiments of our common-law tradition.